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No. 83-

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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED*

1. Should unappealed arbitration awards—as distinguished from state court decisions—be given preclusive effect in cases brought under 42 U.S.C. §1983?

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*All parties to the proceeding in the Court of Appeals are listed in the caption.

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No. 83-

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GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit dated April 19, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 709 F.2d 1505 and is printed in Appendix A at pp. A1-A5. It reversed the judgment of the United States District Court which is printed in Appendix B at pp. A6-A7. The District Court did not write a formal opinion. Its oral order denying defendants' motion for directed verdict is printed in Appendix C at pp. A8-A11. Its order denying defendant Longstreet's motion for judgment notwithstanding the verdict is printed in Appendix D at pp. A12-13.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983. Petition for rehearing was denied on May 16, 1983. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §1738

State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE[1]

On November 25, 1976, petitioner Gary McDonald was fired from his position as a West Branch, Michigan, police officer. He believed there was no just cause for his firing and that the firing was retaliation for activities protected by the First Amendment. McDonald filed a griev-

1. The transcript of the first five days of proceedings contains pages which are numbered 1 through 781. Those pages will be designated "Tr. ....." The transcript of the last two days of proceedings contains different pages which are also numbered 1 through 252. To avoid confusion, these pages will be designated "DTr. ....."

ance under the union collective bargaining agreement to challenge whether there was contractually required "proper cause" for his discharge. The City prevailed at arbitration. McDonald then filed a civil action under 42 U.S.C. §1983 to establish that the firing violated his First Amendment rights. In the civil action, the District Court declined to give the arbitration decision preclusive effect, but received it in evidence together with the arbitration transcript and testimony regarding the arbitration process. The jury rendered a verdict for McDonald finding that the Chief of Police had discharged him in violation of his First Amendment rights.

McDonald's grievance alleged that he had been discharged without "proper cause" in violation of Article III of the collective bargaining agreement.[2] (P. Ex. 8A). The arbitrator treated the grievance as raising only one issue: "Was the discharge of Officer Gary McDonald for just cause?" (P. Ex. 35 at p. 2). McDonald did not raise the issue of whether his discharge also violated his First Amendment rights. The arbitrator's authority was expressly limited to contractual issues and he did "not have authority to alter, add to, delete from, disregard or amend" the agreement. (P. Ex. 42 §21.2 - Step 5).

The arbitrator sustained McDonald's discharge solely on one charge—the charge that he had made "a sexual assault on a minor female." (P. Ex. 35 at pp. 12-13). However, until the arbitration hearing itself, defendants had refused to inform McDonald who it was he was supposed to have assaulted and when and where he was supposed to have assaulted her. (Tr. 166, 235-236, 261-262, 535-536, 706-707, 715-716, 719-720, DTr. 89, 117).

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2. Article III provides in relevant part that the City had the right "to discharge employees for proper cause." (P. Ex. 42 §3.0).

The original discharge notice did not even mention a sexual assault but only "conduct unbecoming an officer." (P. Ex. 8). The subsequent list of "specific incidents of misconduct" referred to "a sexual assault upon a minor female" but failed to indicate when, where or upon whom the assault had allegedly been made. (P. Ex. 9). McDonald made at least six separate requests for the particulars of the charges against him. He made such requests at the time he was discharged (Tr. 155, 567), by phone the following day (Tr. 156-157, 239), at a City Council meeting held December 6, 1976 (Tr. 159, 639), at a grievance committee hearing held December 29, 1976 (Tr. 160, 703-704, P. Ex. 49B), at a City Council hearing held January 27, 1977 (Tr. 161, 399-400, 534-536, 619-621, 639-640, P. Ex. 49A), and at a hearing on March 15, 1977. (Tr. 162-163, 688). He had asked the Chief of Police, the City Manager, the Mayor, the City Council, and both City Attorneys for the name of the "minor female" and the date and place of the alleged "sexual assault." (Tr. 155-163, 239, 261-262, 399-400, 534-576, 619-621, 639-640, 688, 703-704, P. Ex. 49A, P. Ex. 49B). Despite these requests, the City failed to identify the alleged victim and the date and location of the alleged assault until the arbitration hearing itself.

The City refused to tell McDonald the name of the person he was supposed to have assaulted because the City Manager thought it would "give the Union an unfair advantage" if the City had "to show [its] hand." (Tr. 567-568). The refusal was based on the advice of the City Attorney who believed the information should be withheld because "there had been rumors before [that] people had been constantly intimidated." (DTr. 89, 87, Tr. 716).

McDonald was advised by the Union's attorney that he did not have the right to appeal the arbitrator's decision and he did not do so. (Tr. 246). Instead, McDonald brought

suit under 42 U.S.C. §1983 asserting jurisdiction under 28 U.S.C. §1343. He alleged that he was discharged in retaliation for exercising his First Amendment rights to freedom of speech and assembly and his right to petition the government for redress of grievances. (App. at A2, Complaint ¶11 b). McDonald also alleged that his discharge had deprived him of property without due process.[3]

The District Court declined to give the prior arbitration award preclusive effect. (Tr. 68-69, DTr. 3-7). Instead, relying on this Court's opinion in *Alexander v. Gardner-Denver Co.*, the court received the arbitrator's decision in evidence and permitted the parties to introduce extensive evidence about the arbitration process. (*E.g.*, Tr. 165-168, 237-247, DTr. 79-101, P. Ex. 34, P. Ex. 35). Both attorneys discussed the decision and transcript in their closing argument. (*E.g.*, DTr. 184, 198). The jurors had the decision and transcript with them in the jury room during their deliberations. (DTr. 202, 259).

After a six-day trial, the jury found that Chief of Police Longstreet had discharged McDonald for exercising his First Amendment rights. (App. at A15). It awarded McDonald actual and punitive damages against the Chief. (App. at A16). The jury found against McDonald with regard to the remaining defendants. (App. at A2). The District Court entered judgment on the verdict. (App. at A6-A7).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that "the district court should have applied res judicata and collateral estoppel principles to dismiss the Section 1983 action." (App. at A3). Rehearing was denied on May 16, 1983. (App. at A14).

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3. McDonald's complaint also alleged that the union had breached its duty under state law to adequately represent him. The trial court declined to exercise pendent jurisdiction over this state law claim, and it is not before this Court. (App. at A2).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Erred in Its Resolution of an Important Issue Significantly Affecting the Administration of Justice—Whether Arbitration Awards Should Be Given Res Judicata Effect in §1983 Cases.

The question presented is whether unappealed arbitration awards—as distinguished from state court decisions—should be given preclusive effect in employment cases brought under 42 U.S.C. §1983. This is an important question of federal law which should be settled by this Court. Public sector grievance arbitration has become commonplace. Believing that constitutional as well as contractual rights have been violated, public employees frequently pursue both arbitration and an action under §1983. It is crucial that this Court give early and definitive guidance to litigants and the lower courts as to the effect, if any, to be given arbitration awards in subsequent §1983 actions.

Grievance arbitration has become a standard feature of public sector employment relations. More than thirty states and the District of Columbia permit or require grievance arbitration for some or all public employees. In several states, every collective bargaining agreement must provide for grievance arbitration. *E.g.*, Minn. Stat. §179.70(1). In other states, grievance arbitration is a mandatory subject for bargaining. *E.g., Pontiac Police Officers Association v. City of Pontiac*, 397 Mich. 674 (1976). Even states without public employee collective bargaining have approved grievance arbitration under "meet-and-confer" statutes. *E.g.*, Kan. Stat. Ann. §75-

4330(b). Arbitration provisions are contained in standard forms for public employee collective bargaining agreements. *E.g.*, 1 *Pub. Employee Bargaining Rep.* (*CCH*) ¶¶4760.18 (Teachers), 4780.25 (Police), 4810.04 (Firefighters), 4820.06 (Nurses), 4870.16 (Turnpike Employees); 1 *Pub. Personnel Admin.* (*P-H*) ¶¶6601 *et seq.* (1974).

As in the private sector, the grievance arbitrator is limited to interpretation of the contract and must not add to or subtract from it. *E.g.*, Fla. Stat. §447.401. Therefore, a public employee who wishes to vindicate his constitutional as well as his contractual rights must pursue both his remedy under the arbitration agreement and his remedy under 42 U.S.C. §1983. Since arbitration ordinarily is completed first, the District Court trying the §1983 case must determine what preclusive effect, if any, to give the arbitration award. *See, e.g., Kern v. Research Libraries*, 27 FEP Cases 1007, 1008 (S.D. N.Y. 1979). Faced with this recurring question, the District Courts need the definitive answer which only this Court can provide. Just as it was necessary in *Alexander v. Gardner-Denver*, *infra*, to establish arbitration's relationship to Title VII, so it is now necessary to establish its relationship to §1983.

The importance of resolving this issue is vividly illustrated by the decision below which misconstrues §1983 and this Court's prior decisions. The considerations which justified granting preclusive effect to *state court* decisions have no validity if applied to arbitration awards. Unlike state court decisions, arbitration awards ". . . are not subject to the mandate of [28 U.S.C.] §1738." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 477 (1982). Unlike a state court, an arbitrator must ". . . effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander v. Gardner-Denver Co.*, 415

U.S. 36, 56-57 (1974). Unlike state courts and state administrative agencies, arbitrators' special competence is ". . . the law of the shop, not the law of the land." *Id.* at 57; *Kremer, supra,* at 478. As is evident in the present case, ". . . the factfinding process in arbitration usually is not equivalent to judicial factfinding." *Alexander, supra,* at 57; *Kremer, supra,* at 478.

As this Court pointed out in *Kremer,* the characteristics which make contractual grievance arbitration an inappropriate forum for resolving civil rights cases "cannot be attributed to state administrative boards . . . ." *Id.* at 478. Yet the decision below would give preclusive effect to an unappealed arbitration award while no such effect is given to unappealed administrative decisions. *Moore v. Bonner,* 695 F.2d 799, 800-801 (4th Cir. 1982); *Patsy v. Florida International University,* 634 F.2d 900, 910, 926 (5th Cir.) (en banc), *rev'd on other grounds,* ..... U.S. ....., 102 S. Ct. 2557 (1982); *James v. Board of Education,* 461 F.2d 566 (2nd Cir.), *cert. denied,* 409 U.S. 1042 (1972); *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education,* 654 F.2d 868, 877 (3rd Cir. 1981); *Moore v. City of East Cleveland,* 431 U.S. 494, 524 at n. 2 (1977) (Burger, C.J. dissenting); *contra, Snow v. Nevada Department of Prisons,* 543 F. Supp. 752 (D. Nev. 1982).

II

The Decision Below Conflicts With This Court's Decision in Alexander v. Gardner-Denver That Arbitration Awards Shall Not Be Given Preclusive Effect in Title VII Cases.

The decision below conflicts with this Court's holding in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974) that an arbitration award should not be given preclusive effect

in a subsequent civil rights action under Title VII. The reasoning of *Alexander* is equally applicable to the reconstruction-era Civil Rights Acts. *Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982) (42 U.S.C. §1981), *cert. denied*, ... U.S. ....., 103 S. Ct. 1432 (1983); *Kern v. Research Libraries*, 27 FEP Cases 1007 (S.D. N.Y. 1979) (42 U.S.C. §§1981, 1983 and 1985); *Liotta v. National Forge Co.*, 473 F. Supp. 1139 (W.D. Pa. 1979) (42 U.S.C. §1981), *modified on other grounds*, 629 F.2d 903 (3rd Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Hawkins v. Babcock & Wilcox Co.*, 24 FEP Cases 794 (N.D. Ohio 1980) (42 U.S.C. §1981).

The arbitrator is required to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander, supra*, at 56-57; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478 (1982). He violates that obligation if he bases his decision on the requirements of Section 1983, just as much as if he bases it on the requirements of Title VII. *Alexander, supra*, at 53. An arbitrator's special competence is "the law of the shop, not the law of the land." *Id.* at 57; *Kremer, supra*, at 478. He has no more expertise in Section 1983 issues than he does in Title VII issues. Like Title VII, Section 1983 contains "broad language [which] frequently can be given meaning only by reference to public law concepts" and needs the expertise of judicial construction. *Alexander, supra*, at 57. Arbitration's factfinding process is no more adequate for Section 1983 than it is for Title VII. *Id.* at 57; *Kremer, supra*, at 478.

III

Four Courts of Appeals Have Decided That State Administrative Determinations—and A Fortiori Arbitration Awards—Should Not Be Given Preclusive Effect. The Decision Below Conflicts With Those Decisions.

At least four Courts of Appeals have determined that unappealed state administrative determinations should not be granted preclusive effect in §1983 actions. This Court's decision in *Kremer* establishes that administrative agencies are *better* suited than arbitrators to resolve civil rights cases. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478 (1982). Therefore, *a fortiori*, the same Courts of Appeals deny preclusive effect to unappealed arbitration awards. Thus, the decision below granting preclusive effect to an unappealed arbitration award conflicts with decisions in the Second, Third, Fourth and Fifth Circuits denying such effect even to administrative decisions.

In *Moore v. Bonner*, 695 F.2d 799, 800-801 (4th Cir. 1982), the Fourth Circuit stated:

> "It is well settled that the full-faith-and-credit clause and its statutory parallel, 28 U.S.C. §1738 (1976), require federal courts to give preclusive effect to those state court judgments which are given that same effect by the courts of the forum State. See *Allen v. McCurry, supra*. Federal decisions have not, however, generally accorded this preclusive effect to the unappealed decisions of state administrative agencies and to do so would be contrary to congressional policy and to the rationale of recent Supreme Court decisions."

Preclusive effect was denied even though the district court had found that the agency had "provided plaintiff virtually

a judicial type forum in which to present her case." *Moore v. Bonner*, 526 F. Supp. 143, 147 (D. S.C. 1981).

Similarly, in *Patsy v. Florida International University*, 634 F.2d 900 (5th Cir.) (en banc), *rev'd on other grounds*, ... U.S. ....., 102 S. Ct. 2557 (1982), the Fifth Circuit stated:

> "Unlike judicial actions, state administrative proceedings carry no *res judicata* or collateral estoppel baggage into federal court. Resorting to appropriate and adequate state administrative remedies in no way precludes federal court protection of federal constitutional and statutory rights." *Id.* at 910.

At least five of the dissenting judges agreed, stating:

> "If the plaintiff loses on every point of the state administrative claim, since neither *res judicata* nor collateral estoppel apply, the plaintiff may then, having exhausted administrative remedies, return to the federal court to continue the suit." *Id.* at 926.[4]

In *James v. Board of Education*, 461 F.2d 566 (2nd Cir.), *cert. denied*, 409 U.S. 1042 (1972), a high school teacher who had unsuccessfully appealed his dismissal to the New York State Education Commissioner, declined to appeal to state court. *Id.* at 570. In his subsequent §1983 action, the Second Circuit rejected the argument that the decision of the Commissioner was *res judicata*, describing the argument as "wholly without merit." *Id.* at 571. The Second Circuit subsequently reaffirmed the *James* decision in *Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 276 (2nd Cir. 1977), stating that "*Res judi-*

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4. To Petitioner's knowledge, the Court of Appeals for the Eleventh Circuit has not yet dealt with this issue. However, all 12 present members of that court were members of the court which heard *Patsy* and 11 of them joined in one or the other of the statements quoted above.

cata attached when plaintiff chose to pursue her claim in the state courts, and not before."

The Third Circuit came to a similar conclusion in a §1983 case stating that "neither 28 U.S.C. §1738 nor federal common law principles of *res judicata* require deference to administrative as distinct from judicial proceedings." *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 877 (3rd Cir. 1981).

Chief Justice Burger has taken an identical position stating that "state administrative agency determinations do not create *res judicata* or collateral estoppel effects." *Moore v. City of East Cleveland*, 431 U.S. 494, 524 at n. 2 (1977) (Burger, C.J. dissenting).

As discussed above, at least four Courts of Appeals have held that administrative decisions should not be given preclusive effect in §1983 actions. Other courts have specifically held that arbitration awards should not be given preclusive effect under the other reconstruction-era Civil Rights Acts. *Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982) (42 U.S.C. §1981), *cert. denied*, ... U.S. ....., 103 S. Ct. 1432 (1983); *Kern v. Research Libraries*, 27 FEP Cases 1007 (S.D. N.Y. 1979) (42 U.S.C. §§1981, 1983 and 1985); *Liotta v. National Forge Co.*, 473 F. Supp. 1139 (W.D. Pa. 1979) (42 U.S.C. §1981), *modified on other grounds*, 629 F.2d 903 (3rd Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Hawkins v. Babcock & Wilcox Co.*, 24 FEP Cases 794 (N.D. Ohio 1980) (42 U.S.C. §1981). There is no reason to believe that Congress intended that arbitration awards be given greater preclusive effect under §1983 than under the other reconstruction-era Civil Rights Acts. (As discussed in Part II, there is also no reason to give such awards greater preclusive effect under §1983 than under Title VII.)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

(Filed April 19, 1983)

81-1420/1442/1707/1805

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY McDONALD,
Plaintiff-Appellant (81-1420/1707)
Cross-Appellee (81-1442/1805),

v.

CITY OF WEST BRANCH, et al.,
Defendant-Appellees (81-1420/1707)
Cross-Appellants (81-1805),

PAUL LONGSTREET,
Defendant-Appellee (81-1420)
Cross-Appellant (81-1442).

BEFORE: KEITH and MERRITT, Circuit Judges and BROWN, Senior Circuit Judge.

ORDER

Plaintiff-appellant, Gary McDonald, brought this action pursuant to 42 U.S.C. §1983. He was fired from his job as a police officer after 9 1/2 years of service. At the time of his dismissal, plaintiff was the local steward for

the United Steelworkers of America, the collective bargaining unit for the City of West Branch police officers.

On July 26, 1977, an arbitration proceeding was held before Arbitrator George E. Bowles. Plaintiff was represented by a union attorney. The arbitrator held that McDonald had been discharged for "just cause." More specifically, the arbitrator ruled that the plaintiff had been discharged because of his participation in the "Dack incident." The "Dack incident" involved charges that plaintiff had taken indecent liberties with Ms. Barbara Jo Dack.

The plaintiff subsequently filed this section 1983 claim against the City of West Branch and certain of its officers in their official capacities—Chief of Police Longstreet, City Manager Olson, City Attorney Charles Jennings and City Attorney Demetre Ellias. The United Steelworkers was joined as a defendant, but the trial court refused to exercise pendant jurisdiction over the claim against the union. Plaintiff alleged in his complaint that he had been fired for exercising his first amendment rights of free speech and free association.

The case was tried to a jury for six days. The court submitted Special Interrogatory Forms to the jury. Judgment was entered in favor of plaintiff against defendant Longstreet, but in favor of the other defendants. The court awarded $4,400 to plaintiff against Longstreet, consonant with the jury's finding of damages. The court also awarded attorney's fees to the plaintiff against Longstreet in the amount of $16,835.70. However, the attorney's fee award was offset by an assessment of $8,861.40 in attorney's fees against the plaintiff in favor of defendants Ellias and Jennings, the city attorneys. The plaintiff was thus awarded a net amount of only $7,974.30 as attorney's fees. Plaintiff appeals and defendant Longstreet cross-appeals.

Upon review of the record, particularly the arbitrator's award, we conclude that the district court should have applied res judicata and collateral estoppel principles to dismiss the section 1983 action. It is clear from the arbitrator's award that he found that the reason for the plaintiff's dismissal was the Dack incident. Plaintiff's first amendment argument seeks to relitigate this issue and hence to vacate the arbitrator's award. The parties have agreed to settle this dispute through the private means of arbitration. Since we find no abuse of that process, we conclude that its result should not be disturbed.

Therefore, the judgment entered against defendant Longstreet is hereby reversed. Applying this court's principles of *Northcross v. Memphis Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), the plaintiff is entitled to no attorney's fees against any of the defendants because he is not a prevailing party. But defendants Jennings and Ellias are entitled to attorney's fees against the plaintiff since the claims brought against them were frivolous.

Accordingly, this case is remanded to the district court for entry of judgment consistent with this opinion.

Nos. 81-1420/1442/1707/1805
McDONALD v. CITY OF WEST BRANCH, et al.

MERRITT, Circuit Judge, concurring. I concur in the disposition of this case but believe further explanation regarding the res judicata and collateral estoppel doctrines is necessary in order to inform the parties of our reasoning on this complex issue.

Under the doctrines of res judicata or "claim preclusion," when a defendant prevails in an action, the plaintiff is barred from asserting in a later proceeding

against the defendant claims that were or could have been raised at trial. The aim of claim preclusion is to avoid multiple suits on identical obligations between the same parties since the subsequent litigation would necessarily entail the redetermination of the same issues. A valid and final arbitration award has the same effect for purposes of claim preclusion as a court judgment. *See* Restatement of the Laws of Judgments, 2d § 84(1). The arbitration in this case was between the plaintiff, McDonald, and the City of West Branch. The issues raised at the arbitration encompassed or could have encompassed those raised in this suit: the plaintiff's dismissal for allegedly unlawful purposes. Therefore, under the principle of res judicata, the plaintiff is barred from bringing a second action against the City of West Branch.

The plaintiff is also barred for two reasons from bringing suit against the defendant Longstreet, sued in his official capacity. First, the defendant may assert the defense of claim preclusion because of his privity with the defendant in the arbitration, the City of West Branch. The defendant, as police commissioner, acted on behalf of the City when he fired McDonald. The arbitrator found that the City had acted with "just cause" and had not violated the rights of the plaintiff. The doctrine of res judicata has been enlarged in recent years. *See, e.g., Bruszewski v. United States,* 181 F.2d 419, 422 (3rd Cir.), *cert. denied,* 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950); *Miller v. United States,* 438 F.Supp. 514, 520 (E.D. Pa. 1977). Under the expanded rules of privity, the police commissioner may assert the City's defense of res judicata.

Secondly, the plaintiff is barred from suing the police commissioner because of the principles of collateral estoppel or "issue preclusion." The Restatement of the Law of Judgments, 2d § 29 states that:

> A party precluded from litigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify according him an opportunity to relitigate the issue.

Section 27 of the Restatement, referred to above, provides that:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Both Sections 28 and 29 contain exceptions to these general rules on issue preclusion but none are applicable to this case. It is clear from the arbitrator's award that he found that the reason for the plaintiff's dismissal was the Dack incident involving sexual misconduct and not any speech or union activities by the plaintiff. McDonald seeks to relitigate these issues and hence to vacate the arbitrator's award. He has had a full and fair opportunity to be heard on his charge of wrongful dismissal so he is precluded from bringing suit again on those issues.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed March 23, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CIVIL ACTION NO. 79-10281

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, PAUL LONGSTREET, BERNARD OLSON, CHARLES JENNINGS and DEMETRE ELLIAS,
Defendants.

JUDGMENT

At a session of said court held in the Federal Building, Bay City, Michigan, on the 23rd day of March, 1981

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This action having come on for trial before the Court and a jury, and the issues having been duly tried and the jury having rendered its answers to the special interrogatories,

IT IS ORDERED AND ADJUDGED that, as to defendants City of West Branch, Bernard Olson, Charles Jennings and Demetre Ellias, the plaintiff take nothing and that the action be dismissed on the merits.

IT IS FURTHER ORDERED AND ADJUDGED that, as to defendant Paul Longstreet, that the plaintiff recover the sum of Four Thousand ($4,000.00) Dollars in compensatory damages and Four Thousand ($4,000.00) Dollars in punitive damages with interest thereon as provided by law.

Each party will pay his own costs of action. FR Civ P 54(d)

Dated at Bay City, Michigan, this 23rd day of March, 1981.

John P. Mayer, Clerk
/s/ Sara E. Bigsby
Sara E. Bigsby
Resident Deputy Clerk

Approved as to form pursuant to
FR Civ P 58.
/s/ James Harvey
James Harvey
United States District Judge

APPENDIX C

ORAL ORDER OF THE UNITED STATES DISTRICT COURT DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ISSUED MARCH 13, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, et al,
Defendants.

(D Transcript p. 3) THE COURT: Gentlemen, the Court is prepared to rule on the motion for directed verdict under Rule 50 of the Federal Rules of Civil Procedure, which was made yesterday. The Court notes that all but one of the grounds for this motion involved questions of law which are of some magnitude in civil rights actions such as this one. Quite frankly, the Court has not been able to give the detailed and searching considerations of these questions in the short time that it has had since hearing the arguments of counsel. The Court has done the best as it can to research these issues, and is prepared to rule at this time. However, I point this out because the Court may reevaluate or consider in greater depth its rulings herein by way of a judgment notwithstanding the verdict under Rule 50 if the same is brought within ten days from any adverse jury verdict.

First of all, as to the sole factual basis of defendants' motion that there has been insufficient evidence to establish plaintiff's claims against Defendant Ellias, the Court, quite frankly, does believe that there is merit to this contention. However, viewing the evidence presented in the light most favorable to the plaintiff, at this time the Court is inclined to deny the motion and the defendant may wish to raise it again in a motion for judgment notwithstanding the (D Transcript p. 4) verdict.

As to the three legal bases for defendant's motion, the Court again, with qualifications that it is open for reevaluation following the trial, will say it believes at this time that they are without merit.

First of all, the argument that the arbitration decision should be considered res judicata: certainly, public policy favors arbitration of labor disputes, and while this Court believes that policy should be further expanded, the Court also believes that the great weight of judicial authority does not grant arbitration decisions any res judicata effect in subsequent civil rights actions in federal court. Res judicata bars a subsequent action on a matter already litigated, basically if three requirements are met:

First of all, that the prior judgment was rendered by a court of competent jurisdiction. Second, that the decision was a final judgment on the merits.

And third, that it involved the same parties and the same cause of action.

The primary reason for rejecting the application of this doctrine in civil rights actions occurring subsequent to arbitration hearings is the (D Transcript p. 5) belief that arbitrators are not competent to resolve claims based on the Federal Civil Rights Act. And the Court cites in that regard, Alexander versus Gardner Denver Company

found at 415 United States page 36, being a 1974 decision; Gardner versus Giarrusso found at 571 Fed Second, page 1330, being a Fifth Circuit decision decided in 1978.

Therefore, the first requirement for application of the doctrine is not satisfied.

Finally, on the question of immunity for city attorneys, the Court will say that the Court has not received any authority from counsel in support of their argument in this case that Mr. Jennings and Mr. Ellias are entitled to immunity as city attorneys. On the argument of immunity for city attorneys, let me say that the Court has received no authority in support of their argument that Mr. Jennings and Mr. Ellias are entitled to immunity as city attorneys. While as a general proposition it appears likely that they should possess a qualified immunity, they certainly, the Court believes, are not absolutely immune from suit as would be a prosecutor.

Having a qualified immunity, the good faith conduct of these defendants, however, is still a question of fact for the jury.

(D Transcript p. 6) I neglected to say anything about the other argument involving the Monnell case as to whether the City of West Branch was a person for purposes of Section 1983 under the Monnell decision. The Court believes that defendants have read too narrowly, let me say, the Supreme Court's decision in Monnell versus Department of Social Services found at 436 United States page 658, decided in 1978. That case, as you recall, overruled the court's earlier decision in Monroe versus Pate found at 365 United States page 167, a 1961 case, and held, and I quote:

"Congress did intend municipalities and other local government units to be included among those persons in whom Section 1983 apply."

Therefore, under Title 42 United States Code Section 1983, cities can be sued for monetary damages where the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. And the Court would cite Antineau Federal Civil Rights Act at pages 173 and 174, the 1980 addition.

And the Court would say finally in that regard that the action by the City of West Branch in this case, it would seem to the Court, could legally be (D Transcript p. 7) interpreted as officially adopting or promulgating a decision made by certain officers of the city.

For all of these reasons, the Court is turning down the motion for a directed verdict under Rule 50, but suggesting again they may be wished to be raised at a later time on a motion for judgment notwithstanding the verdict.

APPENDIX D

ORDER OF UNITED STATES DISTRICT COURT DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

(Filed May 28, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, et al,
Defendants.

MEMORANDUM OPINION AND ORDER

At a session of said court held in the Federal Building, Bay City, Michigan on the 28 day of May, 1981

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This matter is before the Court on cross motions for judgment notwithstanding the verdict filed by both plaintiff Gary McDonald, and defendant Paul Longstreet.

Having reviewed the arguments of counsel, the Court finds the verdict of the jury, as set forth in their answers to the special interrogatories, consistent with law and

with the instructions of the Court. Accordingly, the Court is unwilling to reopen or set aside the judgment in this matter, and therefore hereby DENIES the present motions of both the plaintiff and the defendant.

IT IS SO ORDERED.

/s/ James Harvey
James Harvey
United States District Judge

APPENDIX E

ORDER OF UNITED STATES COURT OF APPEALS DENYING REHEARING

(Filed May 16, 1983)

Nos. 81-1420/42
81-1707/1805

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY MCDONALD,
Plaintiff-Appellant,
Cross-Appellee,

vs.

CITY OF WEST BRANCH, ET AL.,
Defendants-Appellees,
PAUL LONGSTREET,
Cross-Appellant.

ORDER

BEFORE: KEITH and MERRITT, Circuit Judges, and BROWN, Senior Circuit Judge

Upon receipt and consideration of the petition for rehearing filed herein by the appellant, the Court concludes that the issues raised in the petition were carefully considered upon the original submission and decision of this case, and that rehearing is not required.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
John P. Hehman, Clerk

APPENDIX F

SPECIAL INTERROGATORY FORM REGARDING DEFENDANT LONGSTREET

(Filed March 14, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CIVIL ACTION NO: 79-10281

GARY McDONALD,
Plaintiff,

v.

CITY OF WEST BRANCH, et al.,
Defendants.

SPECIAL INTERROGATORY FORM

Members of the Jury, after your deliberations are completed, you are instructed to answer the following special interrogatories:

Plaintiff's First Amendment Claim

1. Do you find that defendant Paul Longstreet discharged the plaintiff from his position as a police officer in retaliation for, or to suppress, his union activity, and therefore in violation of his First Amendment rights to freedom of speech or association?

yes X no .....

Plaintiff's Due Process Claim

2. Do you find that the plaintiff had a right to procedural due process because he had a "liberty" interest in his continued employment as a police officer, as previously defined in these instructions?

   yes ..... no X

3. Do you find that the plaintiff had a right to procedural due process because he had a "property" interest in his continued employment as a police officer, as previously defined in these instructions?

   yes ..... no X

   (If your answer to either question 2 or question 3 was "yes," proceed to answer question 4, otherwise do not answer the next question.)

4. If you find that the plaintiff had a right to procedural due process because he had either a "liberty" or "property" interest in his employment, do you find that defendant Paul Longstreet deprived him of this right?

   yes ..... no X

   (If your answer to either question 1 or question 4 was "yes," proceed to answer question 5, otherwise do not answer the next question.)

Damages

5. What is the amount of damages which you find the plaintiff has suffered for the deprivation of his rights under 42 USC 1983?

   Amount of Damages:

   Compensatory or Nominal: $4,000.00

   Punitive: $4,000.00

Date: 3/14/81 /s/ Thomas O. Baird
(Foreperson)

No. 83-219

In the Supreme Court of the United States

October Term, 1983

Supreme Court, U.S.
FILED
NOV 14 1983
ALEXANDER L. STEVAS,
CLERK

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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(517) 892-2595
Counsel for Respondents

Petition for Certiorari Filed August 11, 1983.
Certiorari Granted October 3, 1983.

E. L. MERSENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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No. 83-219

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 21, 1979—Plaintiff McDonald's complaint filed in the United States District Court for the Eastern District of Michigan, Northern Division.

December 12, 1979—Answer of Defendant United Steelworkers of America filed.

December 18, 1979—Answer of remaining defendants filed.

December 4, 1980—Memorandum Opinion and Order Granting Defendant United Steelworkers' Motion To Dismiss filed.

February 27, 1981—Jury Impanelled.

March 9, 1981—Trial begins.

March 14, 1981—Trial ends. Special Interrogatory Forms as to Defendants Paul Longstreet, Charles Jennings, Demetre Ellias, City of West Branch, and Bernard Olson, filed.

March 23, 1981—Judgment entered that, as to Defendants City of West Branch, Bernard Olson, Charles Jennings and Demetre Ellias, the Plaintiff take nothing and the action be dismissed on the merits; and that, as to Defendant Paul Longstreet, the Plaintiff recover the sum of $4,000.00 in compensatory damages and $4,000.00 in punitive damages with interest thereon, each party to bear his own costs of the action.

March 31, 1981—Defendant Paul Longstreet's Motion For Judgment Notwithstanding The Verdict filed.

April 6, 1981—Plaintiff's Motion For Judgment Notwithstanding The Verdict filed.

May 28, 1981—Memorandum Opinion and Order Denying Both Motions For Judgment Notwithstanding The Verdict filed.

June 23, 1981—Order Extending Time For Filing Notice Of Appeal filed.

June 26, 1981—Plaintiff's Notice Of Appeal filed.

July 10, 1981—Defendant Longstreet's Notice Of Cross-Appeal filed.

April 16, 1983—Opinion and Order of The Court Of Appeals For The Sixth Circuit filed.

May 16, 1983—Order of The Court Of Appeals For The Sixth Circuit Denying Rehearing filed.

August 11, 1983—Plaintiff's Petition For Writ Of Certiorari filed.

October 3, 1983—Order Granting Plaintiff's Petition For Writ Of Certiorari filed.

PLAINTIFF'S COMPLAINT FILED NOVEMBER 21, 1979

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No: 79-10281

Gary McDonald,
Plaintiff,

vs.

City of West Branch, a municipal corporation; Paul Longstreet, as Chief of Police, West Branch; Bernard C. Olson, as City Manager, West Branch; Charles W. Jennings, as City Attorney, West Branch; Demetre J. Ellias, as City Attorney, West Branch; United Steelworkers of America, District 29, an unincorporated association;
Defendants.

COMPLAINT
DEMAND FOR JURY TRIAL

Now comes Gary McDonald and for his Complaint alleges as follows:

1. Plaintiff is a resident of the City of West Branch, Michigan.

2. Defendant City of West Branch is a municipal corporation duly organized and existing under and by virtue of the laws of the state of Michigan, and is situated in the County of Ogemaw.

3. Defendant Paul Longstreet was and is the duly appointed and acting Chief of Police of the City of West Branch, Michigan, at all times mentioned herein.

4. Defendant Bernard C. Olson was and is the duly appointed and acting City Manager of the City of West Branch, Michigan, at all times mentioned herein.

5. Defendants Charles W. Jennings and Demetre J. Ellias are and were the duly appointed and acting City Attorneys for the City of West Branch, Michigan, at all times mentioned herein.

6. Defendant United Steelworkers of America, District 29, is an unincorporated association of working men, during all times mentioned herein, and was the union representative of plaintiff and two other officers of Local 7935, City of West Branch, Police Officers Union.

7. This Court has jurisdiction under Title 42, United States Code, Sections 1983, 1988, and Title 28 United States Code, Section 1343, in that plaintiff is and has been deprived of his rights secured under the First, Fifth and Fourteenth Amendments to the United States Constitution. The amount in controversy is in excess of Ten Thousand Dollars, exclusive of interest and costs.

8. Plaintiff was, during all times alleged herein, a duly appointed and qualified police officer for the City of West Branch, Michigan, and had been since May, 1967. During that time plaintiff diligently and faithfully performed the duties assigned to him.

9. Plaintiff has a property interest and entitlement to his continued government "employment" which was protected by the Due Process clauses and statutes of the United States based upon the following:

9a. Plaintiff was by Michigan law entitled to retain his office subject only to dismissal and discharge for cause;

9b. Plaintiff was additionally entitled under the contract then existing between the City of West Branch and

the United Steelworkers to retain his position subject only to dismissal and discharge for cause;

9c. Plaintiff further understood his position was permanent by virtue of his understandings with officials of the City of West Branch and past practice.

10. Alternately and additionally, plaintiff has a liberty right, protected by the United States Constitution, not to be deprived of his government position for exercising his fundamental rights of freedom of speech, freedom of association and freedom to petition for redress of grievances without Due Process of law.

11. That on or about November 27, 1976, defendants Chief of Police Paul Longstreet and City Manager Bernard C. Olson, as agents of the City of West Branch and themselves, arbitrarily, maliciously and capriciously discharged plaintiff with the letter, shown in the attached Exhibit A, which is incorporated by reference herein.

11a. The charges, to the extent understood, are false and untrue.

11b. The charges were used as a device to carry out the threats of defendant Chief of Police Paul Longstreet to discharge plaintiff for his union activity in organizing the other police officers, processing grievances, and in the exercise of his rights of free speech, assembly and to petition to redress for grievances, and for the broader purpose of eliminating the union.

11c. The charges are unspecific and unconstitutionally vague and are not sufficient to support any discharge or other disciplinary action.

11d. The letter failed to provide plaintiff with notice of what misconduct he was in fact being charged with in that it did not state exactly what conduct was proscribed,

the date of the alleged misconduct, nor any other circumstances by which plaintiff could be informed and be given any opportunity to prepare a defense, all in a clear effort to deny plaintiff his rights to Due Process.

11e. The defendant City of West Branch had failed to provide any rules or regulations concerning police conduct or misconduct to notify plaintiff and others of any conduct which would be proscribed.

11f. The letter was not a sworn complaint issued by the mayor of the City of West Branch as required by the Michigan statutes.

12. That neither the Chief of Police Paul Longstreet nor the City Manager Bernard C. Olson, nor they together, had authority to discharge plaintiff, when in fact only the Mayor of the City had authority to temporarily suspend a police officer and he did not do so. Thereafter the defendant City of West Branch through its Mayor and City Council failed to rectify the obvious wrongs of its Chief of Police and City Manager in permitting them to assume authority they in fact did not have.

13. The letter was delivered to plaintiff on Thanksgiving day and plaintiff was given no opportunity to have a hearing prior to the discharge, which was effective two days after service.

13a. That plaintiff demanded a hearing prior to discharge, in the form of a grievance on November 26, 1976, but no hearing was given.

13b. Plaintiff is informed and believes that a hearing, after notice by a sworn complaint, was required to be held before the City Council prior to any discharge, under Michigan law. The City Council was required to be presented evidence to support the charges, plaintiff

be given an opportunity to defend and a fair decision be made by the City Council, all of which were denied to him.

13c. The lack of hearing prior to termination and discharge deprived plaintiff of his constitutionally guaranteed rights to liberty, property, and Due Process of law.

14. That defendants Chief of Police Paul Longstreet and City of West Branch were aware that plaintiff had certain medical problems, in part caused by on-the-job injuries or aggravated thereby, and that this, with the discharge, would prohibit any future employment opportunities elsewhere as a police officer; and deprive plaintiff of a liberty interest protected by the Fifth and Fourteenth Amendments to the United States Constitution and statutes thereunder.

15. Defendants Paul Longstreet and City of West Branch were aware that after passage of sufficient time plaintiff could not be automatically reinstated and would be required to be recertified by the Michigan Training Council and should have provided him with a prompt hearing.

16. One month after the discharge a hearing was scheduled before the City Council, or a committee thereof, pursuant to the Union contract; no hearing was in fact held. Defendants Chief of Police Paul Longstreet, City Manager Bernard C. Olson, and City Attorney Charles W. Jennings and/or Demetre J. Ellias refused to present testimony of witnesses. They gave conclusionary statements to the Council, or committee thereof, which accepted same without further inquiry or findings. They exerted pressure upon plaintiff to defend himself by testifying without advising him of the charges.

17. The statutorily required hearing before the City Council was not demanded by defendant United Steel-

workers of America, as plaintiff's representative, and apparently it waived plaintiff's right to same without his consent in denial of plaintiff's right to Due Process of law and in violation of defendant Union's duty of fair representation.

18. The City Council and Mayor of Defendant City of West Branch failed to take action to provide proper procedures to guide defendants Chief of Police and City Manager, to provide the hearing and in failing to order plaintiff restored to duties after failure of showing of cause within the time statutorily required; and for failure to declare the "discharge" action invalid; all in denial of plaintiff's right to Due Process of Law.

19. Plaintiff was advised during the meetings related to this and other matters by the City Attorney Charles W. Jennings that he (plaintiff) should not press his demand for a hearing because it would lead to disruption of plaintiff's family and possibly a divorce.

20. Thereafter, defendant United Steelworkers of America waived a grievance resolution step of mediation by the State Labor Mediation Service, without the plaintiff's consent, breaching its duty of fairly representing your plaintiff, who was a member of the Union and its "Steward".

21. After repeated requests and demands by plaintiff and defendant Union for notice specifying the charges, a letter was sent by defendant City Attorney Charles W. Jennings to the Union one month after the discharge alleging eight "incidents" of misconduct; seven of these "incidents" were beyond the scope of the original letter, Exhibit A, the eighth "Following the County Sheriff" could be reasonably implied within the original letter. They were not in the form of a sworn complaint as required by state law, and failed to disclose the names, dates and other

circumstances which would have allowed plaintiff his constitutionally assured right to prepare a defense.

21a. One "incident" contained in the letter alleges criminal misconduct on the part of the plaintiff, which is false. This "incident" was not within the scope of the original "causes" for discharge, Exhibit A, and was calculated to injure plaintiff's reputation.

21b. This "incident" was previously investigated and rejected by defendant Chief of Police in an internal investigation of the matter prior to plaintiff's discharge and could not properly have been the basis of his decision to discharge plaintiff.

21c. That to this date no criminal charges have been brought against plaintiff regarding this alleged "incident".

22. On or about July 26, 1977, or eight months after plaintiff's discharge an Arbitrator's hearing was held on the eight new "incidents" and not on the original causes for discharge contained in Exhibit A. The Arbitrator rejected all except one, the criminal misconduct.

22a. The plaintiff waived his potential rights as a criminal defendant and testified as to the alleged misconduct. The Arbitrator chose to accept the testimony of the witness rather than plaintiff in regard to the criminal charge.

22b. Defendant Union negligently failed to or refused to present the testimony of companion officer one Louis Osten in rebuttal. Defendant Union through its attorneys failed to demand specification of the charges prior to the Arbitration, failed to properly prepare, sent a new attorney for the hearing rather than the one who had discussed the case with plaintiff prior to the hearing, and because of unfamiliarity with the circumstances failed to fully cross examine the witness to determine her credibility, and was

otherwise negligent in its duty of fair representation of plaintiff.

22c. The Arbitrator upheld the discharge, after determining that the original charges were without merit, based on this one "incident" of the new charges; his decision can not properly support the discharge.

22d. The Arbitrator's decision was announced in November, 1977.

23. Prior to the Arbitration, defendant City of West Branch continued the deprivation of plaintiff's rights by refusing to disclose to a hearing officer for the Unemployment Compensation commission the substance of the charges against plaintiff and effectively prevented plaintiff from obtaining Unemployment Compensation.

24. Defendant City of West Branch by defendant City Manager Bernard C. Olson thereafter denied plaintiff's pension reimbursement claim for the amount which had been deducted from his pay.

25. Thereafter, defendant City of West Branch through its Workers Compensation Insurance Carrier, in negotiating a settlement of plaintiff's injury claim, endeavored to extract a "quit slip" or written statement of voluntary quit from plaintiff as part of its negotiation for settlement of the claim; this is a continuation of defendant City of West Branch effort to deny plaintiff of his rights to Due Process of Law.

26. As a result of the defendants deprivation of plaintiff's constitutional and statutory rights, wrongful and illegal discharge and failure of duty of fair representation, plaintiff has been deprived of wages of more than $36,000.00 to date, other benefits, including pension and medical insurance, and has been greatly injured in his reputation, and prohibited from his chosen profession as a police officer.

WHEREFORE, plaintiff demands:

A) That he be reinstated with full back pay and all benefits accruing since the date of discharge, reasonable attorney fees, and costs of this action:

B) That plaintiff be awarded actual damages and exemplary damages in the sum of $500,000.00: and

C) That plaintiff have such other and further relief as is equitable and just.

[Signatures and Jurat Omitted in Printing]

* * *

DEMAND FOR JURY TRIAL

PLEASE TAKE NOTICE that Plaintiff herein, by and through his attorney, Richard A. Alatalo, demands trial by jury of all the issues so triable.

[Signature Omitted in Printing]

EXHIBIT A

CITY OF WEST BRANCH
119 North Fourth Street
West Branch, Michigan 48661—Phone 1-517-345-0500

To: Gary McDonald, Patrolman
From: Paul Longstreet, Chief of Police
Subject: Discharge and Cause

Effective this date, you are relieved from duty. Effective 12:01 A.M., Saturday, November 27, 1976 you are discharged for proper causes as follows:

1. Conduct unbecoming an officer.
2. Illegal tactics and procedure.
3. Harrassing and thereby alienating other law enforcement agencies with whom we should be able to work cooperatively and in mutual support.

4. Insubordination.

5. Neglect of duty.

Equipment assigned to you is to be turned in prior to the effective date of your discharge (i.e. before 12:01 A.M., Saturday, November 27, 1976). Your permit to carry a concealed weapon by virtue of being a police officer will terminate on or before that time.

The derogatory and in some cases slanderous remarks made by you in public against any and all authority of properly designated City Officials, including the City Council, City Manager and myself can only be construed, as a deliberate attempt to undermine our operation. This, in conjunction with your demoralizing influence on other members of our department has brought us to a point at which our operation is not only ineffectual but intolerable. In light of these facts, the immediacy of the specified actions set forth above are deemed necessary in the interest of public safety and the protection of signators of certain attestment affidavits.

Specific and appropriate actions thereon will be forthcoming at the proper time and place. Authority for this action is cited as, but not limited to, Section 4.7e and 4.11a of the city charter and Article III of our union contract.

Signed:

/s/ Paul Longstreet
Paul Longstreet
Chief of Police

Confirmed:

/s/ B. C. Olson
B. C. Olson
City Manager

"A Wonderful Place to Live"

DEFENDANTS' ANSWER FILED DECEMBER 18, 1979

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Caption Omitted in Printing]

ANSWER, AFFIRMATIVE DEFENSES AND RELIANCE ON JURY DEMAND OF DEFENDANTS CITY OF WEST BRANCH, PAUL LONGSTREET, AS CHIEF OF POLICE, WEST BRANCH; BERNARD C. OLSON, AS CITY MANAGER, WEST BRANCH; CHARLES W. JENNINGS, CITY ATTORNEY, WEST BRANCH; AND DEMETRE J. ELLIAS, CITY ATTORNEY, WEST BRANCH

NOW COME the defendants CITY OF WEST BRANCH, a municipal corporation; PAUL LONGSTREET, as Chief of Police, West Branch; BERNARD C. OLSON, as City Manager, West Branch; CHARLES W. JENNINGS, City Attorney, West Branch; and DEMETRE J. ELLIAS, City Attorney, West Branch, by their attorneys, Smith & Brooker, P.C., and make answer to plaintiff's complaint as follows:

1.

Admitted.

2.

Admitted.

3.

Admitted.

4.

Admitted.

5.

Admitted.

6.

Admitted on information and belief.

7.

For answer to paragraph seven (7) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that the Court has jurisdiction under the sections therein alleged, contained in Titles 28 and 42 of the United States Code.

8.

For answer to paragraph eight (8) of plaintiff's complaint, your defendants deny the same as being untrue, although they admit that the plaintiff was a police officer of the City of West Branch for a number of years up to and including November of 1976.

9.

For answer to paragraph nine (9) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

9a.

For answer to paragraph 9a of plaintiff's complaint, your defendants deny the allegations therein set forth and contained as being untrue, except they admit that, under the agreement between the UNITED STEELWORKERS OF AMERICA and the CITY OF WEST BRANCH, any employee could be discharged for "proper cause" only. By way of further answer, your defendants affirmatively allege that plaintiff was discharged for proper cause and that said discharge was upheld after an ap-

propriate hearing before an arbitrator appointed by the American Arbitration Association, a copy of said opinion being attached hereto and marked Exhibit 1.

9b.

For answer to paragraph 9b of plaintiff's complaint, your defendants admit the same and affirmatively allege that plaintiff was discharged for cause and that said discharge was upheld by the appropriate authorities.

9c.

For answer to paragraph 9c of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

10.

For answer to paragraph ten (10) of plaintiff's complaint, your defendants admit that plaintiff, as well as any other citizen, has certain rights provided under the Constitution and law of the land, but your defendants deny as untrue the allegation that plaintiff has been deprived of his position for exercising his fundamental rights of freedom of speech, association and petition. By way of further answer to said paragraph, your defendants affirmatively allege that the plaintiff, during the time that he was a police officer for the CITY OF WEST BRANCH, engaged in actions unbecoming to an officer of the law, including but not limited to acts of excessive and improper use of authority to such an extent that plaintiff lost his effectiveness as a police officer in the community of West Branch.

11.

For answer to paragraph eleven (11) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that the

plaintiff was discharged on or about November 27, 1976, for cause, growing out of serious acts of misconduct. By way of further answer to said paragraph, your defendants allege that the misconduct of plaintiff was of such a nature and so seriously destructive of plaintiff's role as a police officer that no remedial action other than discharge was appropriate.

11a.

For answer to paragraph 11a of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11b.

For answer to paragraph 11b of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11c.

For answer to paragraph 11c of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11d.

For answer to paragraph 11d of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, and affirmatively allege that plaintiff, prior to discharge, was well aware of the acts of misconduct in which he had engaged and which formed the basis of his discharge for cause.

11e.

For answer to paragraph 11e of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11f.

For answer to paragraph 11f of plaintiff's complaint, your defendants deny the allegations therein set forth and contained as being untrue, except they admit that the letter marked Exhibit A and attached to plaintiff's complaint was not a "sworn complaint."

12.

For answer to paragraph twelve (12) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

13.

For answer to paragraph thirteen (13) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that a letter was delivered to the plaintiff on Thanksgiving day and further admit that the discharge was effective approximately two days thereafter. By way of further answer to said paragraph, your defendants affirmatively allege that the discharge of plaintiff was in the public interest and was precipitated by several acts of misconduct involving citizens of Ogemaw County.

13a.

For answer to paragraph 13a of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that no hearing was given to the plaintiff prior to discharge.

13b.

For answer to paragraph 13b of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

13c.

For answer to paragraph 13c of plaintiff's complaint, your defendants deny the same inasmuch as said allegation is untrue.

14.

For answer to paragraph fourteen (14) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that Defendant PAUL LONGSTREET was cognizant of the fact that plaintiff had "certain medical problems" allegedly caused by injuries sustained in a work-related incident.

15.

For answer to paragraph fifteen (15) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that Defendant LONGSTREET was aware that, after an extensive period of time, plaintiff could not automatically be reinstated unless recertified by the Michigan Training Council.

16.

For answer to paragraph sixteen (16) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

17.

Your defendants make no answer to paragraph seventeen (17) of plaintiff's complaint inasmuch as the allegations contained therein do not pertain to them.

18.

For answer to paragraph eighteen (18) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

19.

For answer to paragraph nineteen (19) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

20.

Your defendants make no answer to paragraph twenty (20) of plaintiff's complaint inasmuch as the allegations contained therein do not pertain to them.

21.

For answer to paragraph twenty-one (21) of plaintiff's complaint, your defendants deny the allegations contained therein inasmuch as said allegations are untrue, except they admit that a letter was sent by Attorney Jennings to the Union.

21a.

For answer to paragraph 21a of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

21b.

For answer to paragraph 21b of plaintiff's complaint, your defendants neither admit nor deny the same, they not having sufficient information, knowledge or belief upon which to predicate either an admission or denial and, therefore, leave the plaintiff to his proofs. Your defendants affirmatively allege that plaintiff has failed to appropriately describe and identify the "incident" to which he is alluding.

21c.

For answer to paragraph 21c of plaintiff's complaint, your defendants neither admit nor deny the same, they not having sufficient information, knowledge or belief

upon which to predicate either an admission or denial and, therefore, leave the plaintiff to his proofs, except your defendants admit, on information and belief, that no criminal charges have been brought against the plaintiff.

22.

For answer to paragraph twenty-two (22) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that on July 26, 1977, a hearing was held in West Branch, Michigan, before the Honorable George E. Bowles, Arbitrator.

22a.

For answer to paragraph 22a of plaintiff's complaint, your defendants deny the allegations contained therein inasmuch as said allegations are untrue, except your defendants admit that the plaintiff testified at the hearing and that the Arbitrator accepted the testimony of a female witness that plaintiff had committed an offense against her person and rejected the testimony of the plaintiff as "not to be believable."

22b.

Your defendants make no answer to paragraph 22b of plaintiff's complaint inasmuch as the allegations contained therein do not pertain to them.

22c.

For answer to paragraph 22c of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except your defendants admit that the Arbitrator upheld the discharge of the plaintiff. By way of further answer to said paragraph, your defendants allege that, from the plain language of the Arbitrator's Opinion, plaintiff was found to be guilty of "questionable judgment" on various occasions in addition to the offense

committed against the person and privacy of a female citizen.

22d.

Admitted on information and belief.

23.

For answer to paragraph twenty-three (23) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

24.

For answer to paragraph twenty-four (24) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

25.

For answer to paragraph twenty-five (25) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

26.

For answer to paragraph twenty-six (26) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

AFFIRMATIVE MATTER

A.

PROVOCATION

Your defendants affirmatively allege that the plaintiff's employment as a police officer was terminated for good cause inasmuch as the plaintiff, prior to discharge, commenced a course of conduct to provoke Defendant LONGSTREET and other public employees, contrary to the best interest of the Police Department for the City of West Branch.

B.

LIMITATION OF ACTIONS

Your defendants affirmatively allege that plaintiff's claim is barred by the Statute Limiting Claims.

C.

LACHES

Your defendants affirmatively allege that plaintiff's claim is barred by laches on his behalf.

D.

WAIVER

Your defendants affirmatively allege that plaintiff has waived any right to proceed in this action by electing the remedy of ARBITRATION.

E.

RES ADJUDICATA

Your defendants affirmatively allege that plaintiff's claim has been adjudicated in the arbitration proceeding and he is barred from litigating the same claim in this Honorable Court.

F.

LACK OF JURISDICTION OVER A MUNICIPALITY

Your defendants affirmatively allege that this Court lacks jurisdiction over the Defendant CITY OF WEST BRANCH which is a municipal corporation and not a PERSON within the meaning of 28 USC 1343 for the purpose of maintaining a civil rights action.

G.

IMMUNITY FROM SUIT

Your defendants affirmatively allege that they are immune from suit inasmuch as the acts complained of were done properly in the performance of defendants' official duties.

H.

FURTHER AFFIRMATIVE DEFENSES

Your defendants reserve the right to raise such other and further affirmative defenses as may be appropriate upon the completion of discovery proceedings in this cause.

I.

RELIANCE ON JURY DEMAND

Your defendants rely upon the jury demand filed by the plaintiff in this cause.

WHEREFORE, your defendants claim judgment of no cause for action, costs and actual attorney fees.

DATED this 17th day of December, A. D. 1979.

[Signature Omitted in Printing]

(Note - Exhibit 1, Arbitration Opinion, appears as Exhibit 35, in following)

PLAINTIFF'S EXHIBIT NO. 8—LETTER DISCHARGING PLAINTIFF McDONALD, NO DATE

CITY OF WEST BRANCH
119 North Fourth Street

West Branch, Michigan 48661—Phone 1-517-345-0500

To: Gary McDonald, Patrolman
From: Paul Longstreet, Chief of Police
Subject: Discharge and Cause

Effective this date, you are relieved from duty. Effective 12:01 A.M., Saturday, November 27, 1976 you are discharged for proper causes as follows:

1. Conduct unbecoming an officer.
2. Illegal tactics and procedure.
3. Harrassing and thereby alienating other law enforcement agencies with whom we should be able to work cooperatively and in mutual support.
4. Insubordination.
5. Neglect of duty.

Equipment assigned to you is to be turned in prior to the effective date of your discharge (i.e. before 12:01 A.M., Saturday, November 27, 1976). Your permit to carry a concealed weapon by virtue of being a police officer will terminate on or before that time.

The derogatory and in some cases slanderous remarks made by you in public against any and all authority of properly designated City Officials, including the City Council, City Manager and myself can only be construed, as a deliberate attempt to undermine our operation. This, in conjunction with your demoralizing influence on other

members of our department has brought us to a point at which our operation is not only ineffectual but intolerable. In light of these facts, the immediacy of the specified actions set forth above are deemed necessary in the interest of public safety and the protection of signators of certain attestment affidavits.

Specific and appropriate actions thereon will be forthcoming at the proper time and place. Authority for this action is cited as, but not limited to, Section 4.7e and 4.11a of the city charter and Article III of our union contract.

Signed:

/s/ Paul Longstreet
Paul Longstreet
Chief of Police

Confirmed:

/s/ B. C. Olson
B. C. Olson
City Manager

PLAINTIFF'S EXHIBIT NO. 8A—GRIEVANCE REGARDING DISCHARGE OF PLAINTIFF McDONALD

GRIEVANCE REPORT

USWA Local Union No. 7935 Grievance NO. 4-GRED-76

Location West Branch Michigan Date NOV 27-1976

EMPLOYEE'S NAME	IDENTIFICATION NO	DEPARTMENT	JOB TITLE
Gary Mc Donald		West Branch City Police	Patrolman

Use space below to write in other important Grievance information

On 11-25-76 I received a written discharge at my home. It was delivered by the Chief and the City Manager. Cited was Article 111 of our contract, and 4.7% and 4.11 of the City Charter. I called the Chief at 10.25AM on the 26th, per steps 1 of the grievance. No satisfaction from the Chief.

Nature of Grievance

We state that the Discharge has no proper cause, and further it shows no proper cause. We further feel that there is no legitimate reason for this type of action, or any other type of action against officer Gary Mc Donald.

Settlement requested in Grievance We request that the aggrieved be made whole, and that full seniority rights be restored for years of service. Further that all wages and benefits be made whole, without any loss of wages, benefits, or time in seniority.

Agreement Violation Article 111 of the union contract.

Signature of Aggrieved Gary McDonald

Signature of Union Representative Gary McDonald

Form USWA 3[illegible]

COPY FOR LOCAL UNION

PLAINTIFF'S EXHIBIT NO. 9—LETTER FROM C. JENNINGS TO D. TAFT, DECEMBER 23, 1976 (SPECIFYING CHARGES)

JENNINGS AND ELLIAS
ATTORNEYS AT LAW
107 NORTH THIRD STREET
WEST BRANCH, MICHIGAN 48661
(517) 345-0450

Bay City Office
215 West Main
Bay City, Michigan 48706
(517) 895-3837

Flint Office
2140 W. Bristol
Flint, Michigan 48507
(313) 239-5291

CHARLES W. JENNINGS
JENNINGS & ELLIAS

December 23, 1976

USA
DEC 27 1976
Field-Bay City

Mr. Don R. Taft
Staff Representative
United Steelworkers of America
1104-11th South Madison Avenue
Bay City, Michigan 48706

Re: 4-CB-D-76

Dear Mr. Taft:

This letter is to confirm our meeting with the Grievance Committee of the West Branch City Council on Wednesday, December 22, 1976, at 7 p.m.

Listed below are specific incidents of misconduct on the part of Officer Gary McDonald for which the City of West Branch caused the letter of November 25, 1976, to be delivered to Officer McDonald:

1. Making a sexual assault upon a minor female.

2. Improper and unauthorized personal use of a police department cruiser, by parking in Bunting's gravel pit with a female companion.

3. Use of threats, harrassment and intimidation in an attempt to procure a date with a minor female.

4. Following two minor females while on duty and attempting to conceal their whereabouts from their parents.

5. Harrassing County Sheriff by following him in his motor vehicle on several occasions.

6. Disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials.

7. Falsely accusing Chief of Police of indecent conduct and attempting to undermine his authority; also a slowdown in enforcement action.

8. Improperly detaining a young female in the police department office without the benefit of a matron.

Yours very truly,

JENNINGS AND ELLIAS
WEST BRANCH CITY ATTORNEYS

BY: Charles W. Jennings

PLAINTIFF'S EXHIBIT NO. 10—INVESTIGATION REPORT, OCTOBER 30, 1976

West Branch City Police

County Ogemaw
Township
Village
City West Branch

Complaint No. 76-328-71
File Class No.
Message No.

COMPLAINT REPORT

Post, District, Bureau or Division West Branch City Police (Name) (Number)

Date October 30, 1976

If this is an original report, complete this box

Complainant Randy Dack
Address West Branch, Michigan
Telephone No.
Time Rec'd
Received by
Investigated by

If this is a supplementary report, complete this box

Date of original investigation
Investigating Officers

If this report concludes complaint, complete this box

☐ Complaint Unfounded ☐ Complaint Closed by Arrest ☐ Service Rendered ☒ Other Disposition
☐ Complaint Closed by Arrest(s) involving person(s) under 18

Date of Final Disposition 10-30-76 Post of Final Disposition (Number)

NATURE OF COMPLAINT Report of a Sexual Assault.

REPORT

INVESTIGATION:

Complainant came to my office and reported that he believed wha on Wed. nite Oct.27, 1976, officers McDonald & Osten had stopped his wife Barbara, and that McDonald some how got the door open" as she had them locked" and got into the car. He then was to have played with titties, legs etc. All the time complainant was telling me this he was crying.

Stated that he wifes father George Trout knew of what took place and wanted to see the Prosecutor about signing a complaint against officer McDonald.

I checked with Mr Trout and he did'nt seem to know anything about what had taken place, and stated he did not believe that it happened. He call Barbara out of the house and she stated quote Mr Longstreet I don't know whats going on but Iam not having an affair with any of your men.

Complainant was recontacted and advised, and he state he could not understand why his wife would tell him something like that if it was not true. Stated he would go out to her fathers place to find out and would get back with me.

STATUS:

Complaint closed at this time. Complainant had told the same story to the City Manager, and Councilman Oswald before coming to me.

Respectfully Submitted,

Paul L. Longstreet

Paul L. Longstreet Chief
West Branch City Police

PLAINTIFF'S EXHIBIT NO. 31—SUBMISSION TO ARBITRATION, DATED FEBRUARY 9, 1977

American Arbitration Association

SUBMISSION TO ARBITRATION

Date: February 9, 1977

The named Parties hereby submit the following dispute to arbitration under the VOLUNTARY LABOR ARBITRATION RULES of the American Arbitration Association.

On November 27, 1976, Officer Gary McDonald, Patrolman with the City Police Department of the City of West Branch, was discharged for proper cause under the agreement dated October 15, 1975 between the United Steel Workers and the City of West Branch.

The letter of discharge citing proper cause defined proper cause as (1) conduct unbecoming an officer, (2) illegal tactics and procedure, (3) harassing and thereby alienating other law enforcement agencies with whom we should be able to work cooperatively and in mutual support, (4) insubordination, and (5) neglect of duty.

The Union disputes the reasons for discharge.

We agree that we will abide by and perform any Award rendered hereunder and that a judgment may be entered upon the Award.

Employer The City of West Branch

Signed by [signature] City Attorney

Charles W. Jenkins

Address 107 North Third Street, West Branch, Michigan, 48661

Union United Steelworkers of America Local 7935

Signed by [signature] Title Staff Representative

Address 1108 S. Madison Ave. - Bay City, MI 48708

PLEASE FILE IN TRIPLICATE

PLAINTIFF'S EXHIBIT NO. 35—ARBITRATION OPINION AND AWARD, DATED OCTOBER 31, 1977

IN THE MATTER OF THE VOLUNTARY ARBITRATION BETWEEN:

Case No. 54 39 0189 77

CITY OF WEST BRANCH

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL 7935.

OPINION

This matter was heard pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association at the County Building, Ogemaw County, City of West Branch, on June 9, 1977. Both parties were represented by counsel, and both filed post-hearing briefs. The hearing was declared officially closed by Deborah K. Reynolds, Tribunal Administrator for the Association, on October 4, 1977.

APPEARANCES

For the City	*For the Union*
Charles W. Jennings, Attorney	John C. Claya, Atty.
Paul L. Longstreet, City Police Chief	Gary McDonald, Police Officer
B. C. Olson, City Manager	Don E. Taft, Staff Rep.
	Sylvia Rassette, Staff Representative

The case involves the discharge of Officer Gary McDonald on December 23, 1976. The City attorney wrote to Don E. Taft, Staff Representative for the Union, making

a specification of the charges on which the discharge was based. They were:

"Listed below are specific incidents of misconduct on the part of Officer Gary McDonald for which the City of West Branch caused the letter of November 25, 1976, to be delivered to Officer McDonald:

1. Making a sexual assault upon a minor female.

2. Improper and unauthorized personal use of a police department cruiser, by parking in Bunting's gravel pit with a female companion.

3. Use of threats, harrassment and intimidation in an attempt to procure a date with a minor female.

4. Following two minor females while on duty and attempting to conceal their whereabouts from their parents.

5. Harrassing County Sheriff by following him in his motor vehicle on several occasions.

6. Disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials.

7. Falsely accusing Chief of Police of indecent conduct and attempting to undermine his authority; also a slowdown in enforcement action.

8. Improperly detaining a young female in the police department office without the benefit of a matron."

CONTRACT PROVISIONS CITED

Article XXI - GRIEVANCE PROCEDURE

Section 21.2, Step 5. Binding Arbitration:

In the event an adjustment is not made, or the dispute regarding the disciplinary action has not been satis-

factorily settled in Step 4, the matter may then be referred within fifteen (15) work days to an impartial arbitrator to be appointed by mutual agreement of the parties. In case the Union and the City cannot mutually agree upon an arbitrator within ten (10) calendar days, one shall be appointed under the rules of the American Arbitration Association. The arbitrator selected shall have authority only to interpret and apply the provisions of this Agreement to the extent necessary to decide the submitted grievance and shall not have authority to alter, add to, delete from, disregard or amend any of the provisions of this Agreement. The decision of the arbitrator shall be final and binding on the parties. The fee and expenses of the arbitrator shall be jointly paid by the City and the Union.

ISSUE:

Was the discharge of Officer Gary McDonald for just cause?

1. Making a sexual assault upon a minor female.

The pivotal testimony is found beginning at page 25 of the transcript and is quoted verbatim:

"A. Then they both got out of the car and they come over to the car and they were talking. Then Gary reached in the window and he grabbed at my legs and then at my breast.

Q. Did he say anything to you? Barbara, I know you're upset, but I want you to tell me what he said, if anything.

A. Before he got out of the car he says, that he had a hard on so big that he couldn't get up.

Q. And did he make any mention about your relationship with your husband?

A. Yes. He said he would be better in bed than Randy was.

Q. You say he touched your legs and did he touch your breast, too?

A. Yes.

Q. All right. Did he ask you to remove any clothing, anything like that?

A. Yes. He told me after he touched my breast, he told me to lift my shirt up and take my bra off.

Q. What, if anything, did you do?

A. Nothing. I just sat there. Once I shut the door and then he opened the door up and Louie told him something, to get back in the car or something and he wouldn't.

Q. I see. Did you leave then?

A. Yes.

Q. Okay. Now, when you left, where did you go?

A. I went right back to my sister's."

On cross-examination, the witness, Barbara Jo Dack, testified:

"Q. What do you remember that he said?

A. Well, when he first got out of the car he said that he had a hard on so big that he couldn't get out of the car.

Q. You say when he first got out of the car. How far was he from the car when he said that?

A. He was walking up towards the car.

Q. And you heard that?

A. Yes.

Q. You did not hear what he and Officer Osten were discussing two feet away from the car, though?

A. No.

Q. What else did he say?

A. He said that—I already said when he said that, come up and see him and his wife because she likes pretty girls, too. And he said to lift up my top. After he grabbed me, he said lift up your top and take your bra off, too, because he wanted to see what was all under that.

Q. What did Officer Osten say, did he stand there?

A. Yes. I don't think he said anything.

Q. And then after this supposedly fondling that took place what happened then?

A. After that he tried—well, I started to roll up the window and he asked where I was going, and I told him home, and he tried opening up the door and he had it open, then I don't know, Louie said something to him, I guess, and he shut the door, he just shut the door himself and I left after that.

Q. You did tell him that you were going home?

A. Yes.

Q. And you rolled up your window?

A. About half-way I had it rolled up.

Q. Then what did Officer McDonald say or do?

A. I don't think he said anything.

Q. Do you remember what he did, he turned away?

A. They both went back and got in the car.

Q. What did you do?

A. I left and went back out to my sister's house."

On cross-examination, the witness testified that she thought that her husband's brother had been on the West Branch Police Force. She said she did not know if he had resigned from that Department. She did testify that she had heard that the brother said that he had brought charges against Officer McDonald, but she never heard the whole story about what went on. She also testified that she had no personal hatred against Officer McDonald and had known him a number of years, but had never been in the same social groups together.

On vigorous cross-examination by Union counsel, variance was shown as to the placing of the car in front of her before she turned off the road preliminary to the incident. Furthermore, it was shown that the witness testified that Officer McDonald walked up beside her car, next to Louis Osten and began talking and that before he got out of the car, that he made a statement about his physical condition.

On cross-examination, she testified:

"Q. What do you remember that he said?

A. Well, when he first got out of the car he said that he had a hard on so big that he couldn't get out of the car.

Q. You say when he first got out of the car. How far was he from the car when he said that?

A. He was walking up towards the car."

It is pointed out that she actually had placed Mr. McDonald in three different places. The first version was that Mr. McDonald was seated when he made the statement. Further, she was unable to recall what state-

ments were made by Officer McDonald and Osten as they approached the vehicle. As to the incident, Officer McDonald testified at page 133:

"Q. Do you remember this specific occasion that Miss Dack testified about?

A. Yes, I do.

Q. All right. Could you relate to the Arbitrator what occurred?

A. Officer Osten and I were on patrol that evening and it was late, I don't know what time it was, it was late at night And we had been on routine patrol. We stopped on Meade Street in front of the Masonic Temple, it's right below the Michigan State Police Post, it's about half, three-quarters of a block off the main street, but you can watch all the traffic coming in and out of town on the main drag. We were sitting there and we had our lights off and maybe only been there a few minutes when a car came down there, come in from the east and turned and pulled up alongside our vehicle. Now, it pulled up across the road, actually it was parked on the wrong side of the road. We were parked on the east side of the road facing north, the other car pulled across and in the car was Barbara Dack.

Q. Did you have a conversation with Miss Dack?

A. Yes, we did.

Q. What was the substance of that conversation?

A. The substance of the conversation was basically with Officer Osten in reference to—she had been having family problems with her husband, and she advised us she was separated and attempting to get a divorce. Officer Osten had had contact with her husband right about that time and in reference to an attempted suicide.

THE ARBITRATOR: On whose part?

A. On the part of her husband, Mr. Dack. She appeared to her manner of talking to have been drinking and I base this on ten years of experience as a police officer, and I do know the girl, and I even knew her even before she drove a car; and she discussed the problem about her husband and that was the general course of conversation. Nobody got out of the cars. She was pulled right up next to the patrol car and the windows were down and at that she pulled up and left, and that's the last we've seen her and the last I ever talked to her.

Q. Did you ever say to her that, I've got a hard on for you?

A. No, I never did.

Q. Did you attempt in any way to leave the vehicle and fondle her breast?

A. No. I didn't—nobody got out of the car. I didn't get out of the car. Her car was parked right beside ours and the conversation that was carried on was carried on right through the car windows.

Q. Did you make any effort to reach in the car and touch her leg?

A. No. I was on the passenger's side and the drivers were parked—she was parked like this, the drivers were to each other, I was on the far side of the car."

DISCUSSION

The Arbitrator has carefully reviewed the whole of the testimony with respect to this incident, and recalls vividly the demeanor of both witnesses and the manner in which both witnesses testified. Through very thorough and capable cross-examination, the only element of bias

or animus that was suggested on the part of the witness against Officer McDonald was her sketchy knowledge of the fact that her brother-in-law had once been on the West Branch Police Department and might have filed some sort of charge against Officer McDonald. This standing alone, would not impeach the testimony of the witness or challenge her credibility.

If she had no personal animus against the grievant, why would she put herself through the very considerable ordeal of testimony under oath on the record, and in the presence not only of the grievant but others whom she knew and did not know? It is specifically recalled that it was necessary to interrupt the testimony to quiet the witness a number of times; a recess was taken on one occasion. The Arbitrator finds that she was reluctant to testify and her testifying caused her noticeable distress and tension, even to the point of tears.

Assessing, then, the credibility of both witnesses, and noting the obvious interest of the grievant in the outcome of this proceeding, the Arbitrator finds the testimony of Ms. Dack is the more believable under all of the circumstances and finds, as a fact, that the incident occurred substantially as she described it so far as the fondling of Ms. Dack, and the request that she take off her bra.

It is true that counsel, on cross-examination, was able to show certain discrepancies as to the beginning of the conversation and the placement of the car or cars in relation to Ms. Dack and the grievant. These discrepancies do not go to the truth of the central pivotal testimony and only tend to show, in the judgment of the Arbitrator, that her version was not carefully and meticulously fabricated or contrived, so that each and every detail was exact and precise, and, therefore, not open to any challenge.

2. Improper and unauthorized personal use of a police department cruiser by parking in Bunting's gravel pit with a female companion.

There was no support in the testimony for this charge.

3. Use of threats, harrassment and intimidation in an attempt to procure a date with a minor female.

There was extended testimony with respect to the attempt of a minor female to arrange a date for another female with Officer McDonald. It would serve no useful purpose to review and recite the whole of the testimony of the principals, but suffice it to say, that it was not established that Officer McDonald himself participated in the attempted procuring of the date. It appears that a young lady, other than the one whom Officer McDonald was to date, was the prime mover, much to the embarassment of the other young lady, her parents and her employers. But the proofs were fatally defective so far as an actual link to Officer McDonald himself.

4. Following two minor females while on duty and attempting to conceal their whereabouts from their parents.

The testimony was offered that Officer McDonald did follow two minor females while on duty in a police vehicle to a gravel pit and turned his lights off while at the gravel pit when it appeared that a car was approaching the police vehicle and the car in which the two minor females were sitting, after having been followed there by Officer McDonald. The situation is an ambiguous one, but it was not established that Officer McDonald was attempting to conceal the whereabouts of the two minor females from their parents. At most, this was an incident showing questionable judgment; it did place him in a position where his conduct would appear improper to suspicious parents.

5. Harrassing County Sheriff by following him in his motor vehicle on several occasions.

The proofs did establish that on several occasions Officer McDonald, in a police vehicle, followed the County Sheriff through town. It was also known that the Sheriff was not supported in his election campaign by Officer McDonald. Here again, it must be found as a fact that the incident or incidents did occur and that they showed questionable judgment on the part of Officer McDonald and also a possible motive of attempted embarassment of the County Sheriff.

6. Disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials.

The proofs did show that Officer McDonald was most outspoken, and tactless, and did play a critical role in expressions against city officials. Such expressions, no doubt, caused embarassment to his Chief, but certainly absent any clear and definitive rule against such expressions, they would not, without warning, be subject to severe penalty. They would be subject to warning ,and perhaps time-off penalty in attempted corrective action.

7. Falsely accusing Chief of Police of indecent conduct and attempting to undermine his authority; also a slowdown in enforcement action.

The proofs showed that Officer McDonald passed along a statement or rumor alleging indecent conduct; that the matter was investigated, and there was a finding made that the Chief of Police had not engaged in any indecent conduct.

Obviously, this incident which had no foundation in fact caused great embarassment and distress to the Chief of Police, but it was not established that the information was turned over by Officer McDonald in a reckless man-

ner, or that he had a base motive in passing the information through investigative channels. Conceivably, a more tactful approach could have been made, but the incident, at most, was that of a person passing along information for investigation by third persons. Furthermore, so far as the charge of undermining the authority of the Chief of Police, Officer McDonald was critical both orally and in writing, of the Chief of Police. It cannot be determined whether the motive was one of undermining the Chief's authority or one of contesting action that rightly or wrongly Officer McDonald believed to be improper. In a dispute over uniforms, Officer McDonald, it was found, did over-react. So far as a slowdown in ticket-writing, this charge failed of proof. It was not established what number of tickets written could constitute the norm, or whether or not officers, including Officer McDonald, had been admonished or instructed what number of tickets should be written or should not be written. Even a bare numerical analysis did not establish that Officer McDonald or other officers were engaged in any deliberate, intentional campaign to slow down ticket-writing and thus embarrass the Chief. So far as Officer McDonald's official relations with young people, the proofs showed that he was one to spend quite a bit of time talking with them and working out problems rather than to pursue a policy or practice of writing tickets on attempting to prosecute; the Arbitrator certainly could not fault this approach. Such an approach sensitively used is the more effective one.

8. Improperly detaining a young female in the police department office without the benefit of a matron.

There was a general practice, and a good one, in the department to have a female suspect placed in the custody of another woman, a matron. This is routine practice in all well-organized departments that have a sufficient com-

plement. But there were occasions in this Department when a matron was not available and therefore, at least for an interval, a male officer would have in custody a female suspect. It was not established that under the particular facts of the incident cited that a department policy was violated, since a matron was not immediately available.

GENERAL DISCUSSION AND RULING

The picture that emerges as to Officer McDonald is that of an Officer who was better than average by admission of his Chief up until May of 1976, and then became a disruptive force in the Department by the view of the Chief. But the discharge action cannot stand on the basis of acts of tactlessness; the grievant himself admits that he is given to candid expression. There is nothing in the record to show that he had been warned, or otherwise disciplined, for expressing his opinion on matters of internal affairs in the Department or indeed in respect to his apparent political activities in support of a rival candidate for sheriff. There must be more than a showing that the grievant was controversial and was critical of Department policy. It has been found as a fact that the Department did not establish a slowdown in ticket writing.

The only serious charge found is that growing out of the Dack incident, and this incident must be examined carefully with reference to the lawful discharge of the duties of a police officer in a small community.

We have found the testimony of Ms. Dack to be credible, and we have found necessarily the testimony of the grievant not to be believable.

Is the offense committed against the person and the privacy of Ms. Dack such a serious offense as to warrant discharge? The police officer, particularly in a small town, has an acutely sensitive role with particular rela-

tion to young people and most certainly, to the opposite sex. He is, at best, a community symbol of fairness and security - a protection for all those who find themselves in a helpless situation. Conversely, he must not use his authority in a way that violates rather than protects those under his control. Such excessive or improper use of authority would be universally condemned as the very opposite of good police practice. Improper or excessive use of authority is destructive of the symbolism of helpfulness and strength that a good police department should have and constantly must seek to keep.

The incident, in the Arbitrator's view, was not one which can be said to have been explained because of any provocation on the part of Ms. Dack. There is no plausible explanation for Officer McDonald's conduct.

Having found this serious violation, may the Arbitrator also find that some penalty, short of discharge, would accomplish the ends of corrective or progressive discipline? It cannot be found that there might not be a repetition of the same or similar acts. So it cannot be found that disciplinary layoff, for example, would accomplish correction. More importantly, it is the deliberate - and reluctant - conclusion of the Arbitrator that Officer McDonald, because of the Dack incident, has lost his effectiveness as a police officer in the community. The misconduct is of such a nature and so seriously destructive of the sensitive police role that it is found that no remedial action of the Arbitrator can be expected to restore Officer McDonald to a position of confidence and acceptance in the community in a police role.

The discharge, therefore, is sustained.

/s/ George E. Bowles
George E. Bowles
Arbitrator

DATED: October 31, 1977
Plymouth, Michigan 48170

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

CITY OF WEST BRANCH

-and-

UNITED STEELWORKERS OF AMERICA,
LOCAL 7935.

CASE NUMBER: 54 39 0189 77

AWARD OF ARBITRATOR

THE Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated October 15, 1975 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

ISSUE:

Was the discharge of Officer Gary McDonald for just cause?

ANSWER:

Yes.

/s/ George E. Bowles
Arbitrator's signature (dated)

[Jurat Omitted in Printing]

PLAINTIFF'S EXHIBIT NO. 42 (EXCERPTS)—ARTICLES I, III & XXI OF COLLECTIVE BARGAINING AGREEMENT BETWEEN UNITED STEELWORKERS OF AMERICA AND THE CITY OF WEST BRANCH, MICHIGAN

[Cover Omitted in Printing]

AGREEMENT

THIS AGREEMENT entered into this 15th day of October, 1975 by and between the City of West Branch, Michigan, hereinafter referred to as the "City" and the United Steelworkers of America, AFL-CIO-CLC, hereinafter referred to as the "Union".

ARTICLE I

PURPOSE AND INTENT
PREAMBLE

WHEREAS the Employer is a public employer and is engaged in furnishing essential public services vital to the Government of the City of West Branch; and

WHEREAS, both the Employer and its employees have a high degree of responsibility to the public to assure the orderly and uninterrupted operations and functions of government; and

WHEREAS both parties recognize this mutual responsibility:

Section 1.0 Purpose and Intent

It is the intent and purpose of the parties that this Agreement shall promote and improve all relationships between the City and the Union and set forth herein the basic agreement covering rates of pay, hours of work, and

conditions of employment to be observed and to provide a procedure for the prompt and equitable adjustment of grievances.

Section 1.1 No Discrimination

It is the continuing policy of the City and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, age, or sex. The representatives of the Union and the City in all steps of the grievance procedure and in all dealings between the parties shall comply with this provision.

Section 1.2 No Discrimination Because of Union Activities

The City agrees that it will not discriminate against, interfere with, coerce or restrain employees in any way because of their membership in, or their activity in behalf of, the Union unless such activity is specifically prohibited by this Agreement.

• • •

ARTICLE III

RIGHTS OF THE CITY

Section 3.0 City Rights

It is hereby recognized by all parties hereto that the City, on its own behalf and on behalf of the electors of the City, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Michigan, and the United States. It is further recognized that the exercise of powers, rights, authority, duties and responsibilities by the City, the adoption of

policies, rules, regulations, and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the terms of this agreement and then only to the extent such terms hereof are in conformance with the Constitution and laws of the State of Michigan and the Constitution and laws of the United States.

Among the powers, rights, authority, duties and responsibilities which shall continue to be vested in the City of West Branch, but not intended as a wholly inclusive list of them, shall be: The right to direct the work of its employees; hire, promote, assign, transfer or retain employees; demote, suspend or discharge employees for proper cause; maintain the efficiency of the departmental operation; relieve employees from duties because of lack of work or other legitimate reasons; determine the methods, means and personnel by which operations are to be carried on.

• • •

ARTICLE XXI

GRIEVANCE PROCEDURE

Section 21.0 Definition

"Grievance" as used in this agreement is limited to a complaint which involves the interpretation or application of, or compliance with, the provisions of this agreement.

Section 21.1 Efforts to Adjust Grievances

All grievances, disputes or complaints arising under and during the term of this agreement shall be settled in accordance with the procedure herein provided. Every effort shall be made to adjust controversies and disagree-

ments in an amicable manner between the Employer and the Union.

Section 21.2 Earnest Effort to Settle Promptly

Should any grievance, dispute or complaint arise over the interpretation or application of the contents of this agreement, there shall be an earnest effort on the part of the parties to settle such promptly through the following steps.

Step 1. An employee with a grievance shall first discuss it with his immediate supervisor, with the Union representative present.

Step 2. If the employee's grievance is not resolved in Step 1, the employee shall reduce his grievance to writing, stating all the facts, and present it to the Union Grievance Committee. If the Union Grievance Committee deems the grievance a just one they will present the grievance at a joint conference with the committee from the City Council or directly with the department head.

Step 3. If the grievance is not resolved in Step 2, the employee may appeal to the West Branch City Council.

Step 4. If the grievance is not resolved in Step 3, the matter may then be referred within thirty (30) days to the State Labor Mediation's Server. The parties will then, in accordance with law, request non-binding mediation, provided, however, that the Union and the City Council may agree to binding mediation by the State Labor Mediation Server. It is expressly understood and agreed that there is no suggestion in this provision to in any way obligate either party to enter an agreement to have the mediation binding.

Note: The Step 5 portion of the Grievance Procedure shall *only* become operative in cases dealing with disciplin-

ary action or discharge and then only after all steps of the Grievance Procedure as set forth in this Article XXI have been exhausted unless the City and the Union have agreed in writing otherwise.

Step 5. Binding Arbitration: In the event an adjustment is not made, or the dispute regarding the disciplinary action has not been satisfactorily settled in Step 4, the matter may then be referred within fifteen (15) work days to an impartial arbitrator to be appointed by mutual agreement of the parties. In case the Union and the City cannot mutually agree upon an arbitrator within ten (10) calendar days, one shall be appointed under the rules of the American Arbitration Association. The arbitrator selected shall have authority only to interpret and apply the provisions of this Agreement to the extent necessary to decide the submitted grievance and shall not have authority to alter, add to, delete from, disregard or amend any of the provisions of this Agreement. The decision of the arbitrator shall be final and binding on the parties. The fee and expenses of the arbitrator shall be jointly paid by the City and the Union.

• • •

PLAINTIFF'S EXHIBIT NO. 49A—MINUTES OF THE SPECIAL MEETING OF THE CITY COUNCIL HELD JANUARY 27, 1977

SPECIAL MEETING OF THE WEST BRANCH CITY COUNCIL HELD IN THE COUNCIL ROOM OF THE CITY HALL, THURSDAY, JANUARY 27, 1977

Meeting was called to order by Mayor George Madison at 6:45 P.M.

Present: Mayor George Madison, Councilmen Arnold Dunbar, Reuben Kaarre, Jack Oswald, Richard Weryh [sic] and Thomas Zettel

Absent: Councilman Ross Reed

Others present: City Manager-Clark Bernard Olson, Police Chief Paul Longstreet, City Attorneys Jennings and Ellias, Steelworkers Union Representative Don Taft and Gary McDonald

Mayor Madison stated the purpose of the meeting was for the Council to hear the grievance of Mr. Gary McDonald, discharged patrolman. He asked Mr. Taft if he had any objections to the meeting being taped. Mr. Taft indicated that he had none as long as he knew that this was the case and commented on his objection to the Grievance Committee taping without such advance notice. Mayor Madison then turned the meeting over to City Attorney Charles Jennings.

Mr. Jennings stated that he would review the grievance procedure for the benefit of the Council and read charges as provided to Union Representative Taft by letter. He read the charges and asked Mr. Taft how he wished to respond.

Mr. Taft stated that he wished to respond item by item to each charge and proceeded accordingly. Each

charge was discussed. Mr. Taft's basic contention was that he would not recognize affidavits unless the signator is available for cross-examination as a witness. His request as to names, times and places were provided with the exception of charge number one and the witness in charge number two which Attorney Jennings stated he would not provide until the proper time. Union Representative Taft upon query of Attorney Jennings as to procedure indicated that he would prefer going to compulsory arbitration as opposed to nonbinding mediation as the next step in the grievance procedure if necessary.

Councilman Kaarre was excused at 7:55 P.M. to attend another meeting as previously requested.

Mr. Jennings called for a recess and Mr. Taft and Mr. McDonald were excused at 7:55 P.M.

Meeting was reconvened at 8:15 P.M.

Motion by Oswald, supported by Zettel, that for lack of sufficient evidence to the contrary, the discharge of Mr. McDonald be upheld.

Yes: Thomas Zettel, Richard Werth, Jack Oswald, Arnold Dunbar and Mayor Madison

No: None

Absent: Reuben Kaarre and Ross Reed

Motion carried

Upon recommendation of Attorney Jennings Council agreed to waive mediation. Attorney Jennings then asked Union Representative Taft to agree to such waiver for the record. Mr. Taft agreed.

Motion by Oswald, supported by Zettel, that the meeting be adjourned at 8:20 P.M.

[Signatures Omitted in Printing]

OPINIONS, DECISIONS, JUDGMENTS, ORDERS AND OTHER PARTS OF THE RECORD

The following opinions, decisions, judgments, orders and other parts of the record have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the printed Petition for Writ of Certiorari:

Oral Order of The United States District Court Denying Defendants' Motion For Directed Verdict, Issued March 13, 1981 A8

Special Interrogatory Form Regarding Defendant Longstreet, Filed March 14, 1981 A15

Judgment of The United States District Court, Filed March 23, 1981 A6

Order of The United States District Court Denying Motion For Judgment Notwithstanding The Verdict, Filed May 28, 1981 A12

Opinion of The United States Court Of Appeals, Filed April 19, 1983 A1

Order of The United States Court Of Appeals Denying Rehearing, Filed May 16, 1983 A14

83-219

No. 83-

Office - Supre
FILE
SEP 6 1983
ALEXANDER STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I.

SHOULD UNAPPEALED ARBITRATION AWARDS — AS DISTINGUISHED FROM STATE COURT DECISIONS — BE GIVEN PRECLUSIVE EFFECT IN CASES BROUGHT UNDER 42 U.S.C. § 1983?

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No. 83-

IN THE

Supreme Court of the United States

October Term, 1983

GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, City of West Branch, Michigan; Paul Longstreet, Chief of Police; Bernard C. Olson, City Manager; Charles W. Jennings, City Attorney; Demetre J. Elias, City Attorney; and United Steel Workers of America, District 29, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the order of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

PETITIONER'S ARGUMENT IS WITHOUT MERIT BECAUSE PETITIONER'S PROPOSED INTERPRETATION OF 28 U.S.C. § 1738 and 42 U.S.C. § 1983 CONTRAVENE BOTH PUBLIC POLICY AND THE LEGISLATIVE INTENT OF CONGRESS TO PRECLUDE JUDICIAL REVIEW ABSENT ABUSE OF PROCESS.

This Court in *Allen* v. *McCurry*, 499 U.S. 90, 101 S. Ct. 411 (1980), held that the preclusion rule emanating from the full faith and credit clause of the United States Constitution, U. S. Const. art IV, § 1, applies to § 1983 litigation.

The implementing legislation, § 1738, applies to both federal and state courts. Preclusion effect will be withheld from state court decisions only in the event the state court has evidenced an unwillingness or inability to protect the claimant's federal rights. This allows redress in the event of inferior state remedies.

The *Allen* court acknowledged the competing considerations arising out of a strong congressional concern that the state courts were not sufficiently dedicated to the protection of federal rights and a congressional desire to allow wronged parties a *de novo* trial. However, it indicated that in order for § 1983 to override the doctrine of preclusion advanced in § 1738, there must be "some affirmative showing" of a "clear and manifest" intent to override § 1738.

This court specifically rejected the ". . . generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . ." *Supra* at 101 S. Ct. 419.

The thrust of petitioner's argument is that unappealed arbitration awards may not be given preclusive effect since they are not *state court decisions*. It ignores, however, the language within § 1738 which requires ". . . federal courts to give preclusion effect to state court judgments whenever the courts of the state from which the judgments emerge would do so". *Id.* at 101 S. Ct. 415.

Michigan courts give preclusive effect to labor arbitration awards; and they may not be impeached even if there are erroneous findings of fact, erroneous rulings, or errors of law for the reason that the contractual element is present in the award. An error of law will render the award void only if it requires the parties to do an illegal act or violate a positive mandate of the law. *Fraser* v. *Ford Motor Co.*, 364 Mich. 648; 112 N.W.2d 80 (1961).

The underlying rationale for this holding is that the parties agreed to resolve their disputes by arbitration and they specifically agreed to be bound by the decision. Absent fraud or mistake, a claimant cannot reject the scope of the agreement. *Stowe* v. *Mutual Home Builders Corp.*, 252 Mich. 492; 233 N.W. 391 (1930).

In Michigan, the petitioner could have proceeded to have the arbitration award vacated. He chose not to do so. In the absence of pursuing his appellate remedy, the arbitration award becomes final and not subject to collateral attack. The arbitrator has effected the contractual intent of the parties.

The order of the Sixth Circuit Court of Appeals filed April 19, 1983, evidenced proper review of this case applying the preclusion doctrine. The judges reviewed the case in its entirety and all concluded that the petitioner's § 1983 suit was an attempt to relitigate the reason for his dismissal and vacate the arbitration award.

The only remaining question is whether or not claimant suffered an abuse of process. The Sixth Circuit found there was none.

Having concluded that the First Amendment issue was a subterfuge to retry the arbitration, the appellate court had no authority, absent abuse of process, to withhold preclusion effect to the arbitration finding. It must give the same preclusion effect to the arbitration award that the courts of the state from which it emerged would. The facts litigated at trial were identical to the facts which were, or could have been, litigated at arbitration.

The public policy argument for the federal courts absenting themselves from cases where there are recognizable arbitration standards subject to judicially supervised constitutional limits is compelling. Allowing collateral attack on arbitration decisions in which the state has a compelling interest is not consistent with the legislative intent of Congress and interferes in the legitimate areas of state responsibility.

Petitioner, in attempting to support his argument that preclusion effect may not be given to arbitration awards, relies heavily on this Court's language in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461; 102 S. Ct. 1883; *reh. denied*, 103 S. Ct. 20 (1982).

Interestingly enough, however, *Kremer* holds that a federal district court is required under § 1738 to give preclusion effect to a state court decision upholding an

administrative agency's rejection of an employment discrimination claim. Additionally, petitioner is precluded from litigating the same grievance in a federal court when under the laws of the state of New York petitioner could not raise the same grievance in the courts of New York.

Thus, § 1738 prevails and the historic respect of the federal court for state court judgments remains intact.

Petitioner argues that this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36; 94 S. Ct. 1011; 37 L. Ed.2d 147 (1974) should control in this case alluding to the language that any private arbitrator's decision which purports to resolve a Title VII complaint will not bar subsequent suit in federal court. Respondents disagree.

The petition for writ of certiorari was granted in *Gardner-Denver*, a Title VII case, to discuss the weight, if any, to be given to overlapping decisions that one forum must give to a determination in another. Title VII cases are unique in that a claimant has at least four forums in which to process his claim. The claimant may look to the state for relief via a state administrative agency, a state court, EEOC, and, finally, a federal court.

The decision spoke to the merits of the doctrine of preclusion as applied to administrative and arbitration hearings while recognizing that the ultimate responsibility for the protection of a claimant's federal rights rests in the federal courts.

Indeed, this Court indicated that where a competent arbitrator presides over a hearing in a procedurally fair manner and develops an adequate record regarding discrimination, the arbitration findings are accorded great weight. *Id.* at 415 U.S. 60, n. 21.

If the arbitration award is subject to judicial review and the state courts may apply *res judicata* and collateral estoppel principles, it takes no great leap of logic to assume that an arbitration decision could deserve preclusive effect.

What the court said in *Alexander* v. *Gardner-Denver Co., supra,* regarding arbitration is that the federal policy which favors arbitration may not be interpreted to mean that an arbitrator's resolution of a contractual claim disposes of a statutory claim under Title VII. *Id.* at 1019, n. 6. It concluded that federal policy in favor of arbitration and against discriminatory practices can best be accomplished by allowing the employee to pursue both the grievance procedure and his cause of action under Title VII.

The *Gardner-Denver* court also spoke to the election of remedies problem acknowledging that unless the Title VII federal enforcement proceedings mesh with the state proceedings there will be an incentive by the claimant to abandon state proceedings and concentrate on the federal remedy. This would appear to fly in the face of the concept that Title VII is designed to supplement, rather than supplant, existing laws and institutions of the state to protect against employment discrimination. *Supra* at 415 U.S. 48-49.

Respondents submit that no such issues entered into this case.

The arbitration dealt with whether or not the City of West Branch had "just cause" to fire petitioner. The arbitrator, after a "judicial type" hearing said it did on the basis of the "Dack incident". No constitutional issues were raised either before or at arbitration. Petitioner instituted his First Amendment suit after the arbitrator's decision was adverse to him.

In his federal suit, he complained that his discharge as a police officer was in retaliation for expressing his First Amendment rights to freedom of speech and assembly as well as a claim that the discharge procedure denied him due process under the 14th Amendment.

The arbitration proceeding was not used by petitioner for resolving his civil rights claim.

A review of the special interrogatory form reveals that the jury found that petitioner was discharged from his position as police chief in retaliation for, or to suppress, his union activity, whereas, the arbitrator found the petitioner was discharged for the "Dack incident".

The identical issue was raised in both forums. Under the doctrine of *res judicata* and collateral estoppel, the jury should have been foreclosed from passing on this issue. Since they found there were no due process violations, a judgment notwithstanding the verdict should have been entered by the trial court.

On review, the Sixth Circuit Court of Appeals applied the doctrine of preclusion and, having found no evidence of an unwillingness or inability on the part of the state to protect the claimant's federal rights, reversed the judgment of the lower court as to the defendant Longstreet.

This suit is not unlike *Smith* v. *Dawes*, 614 F.2d 1069 (5th Cir. 1980), wherein the plaintiff-employee appealed the district court grant of a summary judgment dismissing her suit for wrongful discharge.

In *Smith*, the bargaining agreement had a clause for binding arbitration. A hearing was held, and the arbitrator ruled that under the applicable regulations, the plaintiff's discharge was for just cause. Plaintiff then

brought a suit on a breach of the bargaining contract, 39 U.S.C. § 1208 (b), contending that her discharge for the reasons given by the arbitrator was in breach of the collective bargaining agreement. She asked the court to determine whether the arbitrator's decision was so erroneous that it was arbitrary and capricious. The appellate court, in affirming the judgment of the lower court, said:

> "Having availed herself of the grievance procedures of the collective bargaining contract, the plaintiff-employee is likewise subject to the contract provision that the arbitrator's decision is final and binding." *Supra* at 1073.

In footnoting its opinion, the court stated that it did not interpret the lower court's reasoning in granting its summary judgment as holding it had no jurisdiction to entertain a litigation, but that its essential holding was that there was no genuine issue of law or fact because the arbitrator's decision was final and binding. *Id.* at 1070.

This case, being devoid of a constitutional rights issue in the first instance, is subject to the mandate of 28 U.S.C. § 1738.

II.

THERE IS NO CONFLICT OF DECISIONS ON THE ISSUE PRESENTED IN THE PETITION.

Petitioner seeks a grant of writ of certiorari on the grounds that the decision in this matter is in conflict with four courts of appeals which have decided that state administrative determinations — and a fortiorari arbitration award — should not be given preclusive effect.

The cases cited by petitioner for the proposition all deal with civil rights issues raised in the initial grievance in a § 1983 action or are cases brought under other reconstruction civil rights acts.

Kremer, supra, was an employment discrimination claim heard before an administrative agency.

Moore v. *Bonner,* 695 F.2d 799 (4th Cir. 1982) was a civil rights action brought by a teacher as a result of defendant's decision not to renew her contract.

James v. *Board of Education,* 461 F.2d 566 (2d Cir.) *cert. den.,* 409 U.S. 1042 (1972), was a complaint under § 1983 alleging violation of the plaintiff's civil right to wear a black armband in class.

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. *New Jersey State Board of Higher Education,* 654 F.2d 868 (3d Cir. 1981) involved a federal suit by non-parties to a state enforcement proceeding advancing independent constitutional rights.

In *Patsy* v. *Florida International University,* 634 F.2d 900 (5th Cir.) (en banc), *rev'd on other grounds;* 102 S. Ct. 2557 (1982), the suit was in the nature of a civil rights action brought by the employee, Patsy, against the University alleging sex and racial discrimination.

Interestingly enough, in *Patsy,* the appellate court held that the civil rights suit may be dismissed for failure to exhaust administrative remedies before the § 1983 action is brought in federal court, absent the traditional exceptions to general exhaustion of remedies rule. Citing *McKart* v. *United States,* 395 U.S. 185; 89 S. Ct. 1657; 23 L. Ed.2d 194 (1969).

None of these cases deal with an administrative decision or an arbitration award in a non-civil rights case.

A valid and final arbitration award has the same effect for purposes of claim preclusion as a court judgment. Restatement of the Law of Judgments, 2d, § 84 (1).

The Restatement of the Law of Judgments, 2d, § 27, states that:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

This preclusion applies not only to an opposing party but also applies to any other person unless there is evidence that the litigant lacked a full and fair opportunity to litigate the issue in the first action, or he presents circumstances which justify him an opportunity to relitigate the issue. Restatement of the Law of Judgments, 2d, § 29.

In summary, it is apparent that the alleged conflict presented by petitioner is, at best, illusory.

In order to create a conflict, the petitioner has relied exclusively on the federal courts' interpretation of the preclusion doctrine as it relates to Title VII cases.

All of the cases cited by the petitioner have at their very foundation a federal right which was proclaimed by the asserting party in the first instance. Thus, this case is factually distinguishable from the cases cited.

There is no public policy reason or documented congressional intent to override § 1738 by enactment of § 1983. Rather, *Allen* v. *McCurry*, *supra*, suggests that the courts and Congress wish to defer to state court authority whenever such deference does not undermine procedural fairness.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 83-219

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED*

1. Should unappealed arbitration awards—as distinguished from state court decisions—be given preclusive effect in cases brought under 42 U.S.C. §1983?

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*All parties to the proceeding in the Court of Appeals are listed in the caption.

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No. 83-219

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
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CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals is reported at 709 F.2d 1505. Its opinion is not yet reported and is printed in Pet. App. A1-A5. It reversed the judgment of the United States District Court which is printed in Pet. App. A6-A7. The District Court did not write a formal opinion. Its oral order denying defendants' motion for directed verdict is printed in Pet. App. A8-A11. Its order denying defendant Longstreet's motion for judgment notwithstanding the verdict is printed in Pet. App. A12-A13.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983. Petition for rehearing was denied on May 16, 1983. The petition for writ of certiorari was filed on August 11, 1983, and granted October 3, 1983. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §1738

State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall

be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE[1]

On November 25, 1976, petitioner Gary McDonald was fired from his position as a West Branch, Michigan, police officer. (Tr. 155). McDonald filed a grievance under the union collective bargaining agreement to challenge whether there was contractually required "proper cause" for his discharge. (Ex. 8A, J.A. 26, Tr. 158). The City prevailed at arbitration. (Ex. 35, J.A. 30, Tr. 764-765). McDonald then filed a civil action under 42 U.S.C. §1983 to establish that the firing violated his First Amendment rights. (Complaint, J.A. 3). In the civil action, the District

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1. The transcript of the first five days of proceedings contains pages which are numbered 1 through 781. Those pages will be designated "Tr. ..... ". The transcript of the last two days of proceedings contains different pages which are also numbered 1 through 252. To avoid confusion, these pages will be designated "DTr. ....."

Court declined to give the arbitration decision preclusive effect, but received it in evidence together with the arbitration transcript and testimony regarding the arbitration process. (Tr. 68-69; DTr. 3-7, Pet. App. at 8-11; P. Ex. 34, Tr. 764-765; P. Ex. 35, J.A. 30, Tr. 764-765; *e.g.*, Tr. 165-168, 237-247; DTr. 79-101). The jury rendered a verdict for McDonald finding the Chief of Police had discharged him in violation of his First Amendment rights. (Pet. App. at 15-16).

McDonald's grievance alleged that he had been discharged without "proper cause" in violation of Article III of the collective bargaining agreement.[2] (P. Ex. 8A, J.A. 26, Tr. 158). The arbitrator treated the grievance as raising only one issue: "Was the discharge of Officer Gary McDonald for just cause?" (P. Ex. 35 at p. 2; J.A. 30 at 32; Tr. 764-765). As respondents acknowledge, McDonald did not raise the issue of whether his discharge also violated his First Amendment rights. (Respondents' Brief In Opposition at p. 6, P. Ex. 34, Tr. 764-765). The arbitrator's authority was expressly limited to interpretation and application of the agreement "to the extent necessary to decide the submitted grievance," and he had no authority "to alter, add to, delete from, disregard or amend" the agreement. (P. Ex. 42 §21.2 - Step 5; J.A. 45 at 49; Tr. 587-588). Since it was not submitted to him, he had no authority to deal with the constitutional issue and his decision does not mention it. (P. Ex. 35, J.A. 30).

The arbitrator sustained McDonald's discharge solely on one charge—the charge that he had made "a sexual assault on a minor female." (P. Ex. 35 at pp. 12-13; J.A. 30

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2. Article III provides in relevant part that the City had the right "to discharge employees for proper cause." (P. Ex. 42 §3.0, J.A. 45, Tr. 587-588).

at pp. 42-43, Tr. 764-765). However, until the arbitration hearing itself, defendants had refused to inform McDonald who it was he was supposed to have assaulted and when and where he was supposed to have assaulted her. (Tr. 166, 235-236, 261-262, 535-536, 706-707, 715-716, 719-720, DTr. 89, 117).

The original discharge notice did not even mention a sexual assault but only "conduct unbecoming an officer." (P. Ex. 8, J.A. 22, Tr. 156). The subsequent list of "specific incidents of misconduct" referred to "a sexual assault upon a minor female" but failed to indicate when, where or upon whom the assault had allegedly been made. (P. Ex. 9, J.A. 27, Tr. 160). McDonald made at least six separate requests for the particulars of the charges against him. He made such requests at the time he was discharged (Tr. 155, 567), by phone the following day (Tr. 156-157, 239), at a City Council meeting held December 6, 1976 (Tr. 159, 639), at a grievance committee hearing held December 29, 1976 (Tr. 160, 703-704; P. Ex. 49B, J.A. 52, Tr. 604-605), at a City Council hearing held January 27, 1977 (Tr. 161, 399-400, 534-536, 619-621, 639-640; P. Ex. 49A, J.A. 50, Tr. 604-605), and at a hearing on March 15, 1977. (Tr. 162-163, 688). He had asked the Chief of Police, the City Manager, the Mayor, the City Council, and both City Attorneys for the name of the "minor female" and the date and place of the alleged "sexual assault." (Tr. 155-163, 239, 261-262, 399-400, 534-576, 619-621, 639-640, 688, 703-704, P. Ex. 49A, Tr. 604-605, P. Ex. 49B, Tr. 604-605). Despite these requests, the City failed to identify the alleged victim and the date and location of the alleged assault until the arbitration hearing itself.

The City refused to tell McDonald that Barbara Dack was the person he was supposed to have assaulted because

the City Manager thought it would "give the Union an unfair advantage" if the City had "to show [its] hand." (Tr. 567-568). The refusal was based on the advice of the City Attorney who believed the information should be withheld because "there had been rumors [that] people had been constantly intimidated." (DTr. 89, 87, Tr. 716).

Even at the arbitration, the City failed to disclose to McDonald the existence of an investigation report—signed by the Chief of Police—casting serious doubt on Mrs. Dack's credibility and on the chief's motives. (Tr. 536; P. Ex. 10, J.A. 28, Tr. 505-506). That report showed that the allegations of a sexual assault on Mrs. Dack had been investigated by the chief on October 30, 1976. (P. Ex. 10, J.A. 28). As part of that investigation, the chief interviewed Mrs. Dack and she said nothing about any sexual assault. (P. Ex. 10, J.A. 28; Tr. 498-502, DTr. 36-38, 48-50). The report showed that, after that interview, the chief was sufficiently satisfied of McDonald's innocence to close the investigation. (P. Ex. 10, J.A. 28; Tr. 502).

McDonald was not permitted to have his own lawyer at the arbitration and was represented by a lawyer selected by the union. (Tr. 238). Despite McDonald's urgings, the union refused to call Officer Louis Osten as a witness in his behalf. (Tr. 165-166). Officer Osten had been with McDonald at the time the sexual assault allegedly occurred. (Tr. 165-166, 343, DTr. 31). If called, he would have testified—as he did at trial—that no assault occurred and that McDonald neither touched Mrs. Dack nor said anything offensive to her. (Tr. 343-346, 354).

McDonald was advised by the union's attorney that he did not have the right to appeal the arbitrator's decision and he did not do so. (Tr. 246). Instead, McDonald

brought suit under 42 U.S.C. §1983 asserting jurisdiction under 28 U.S.C. §1343. He alleged that he was discharged in retaliation for exercising his First Amendment rights to freedom of speech and assembly and his right to petition the government for redress of grievances. (Pet. App. at A2; Complaint ¶¶10, 11, J.A. 3, 5). McDonald also alleged that his discharge had deprived him of property without due process.[3]

The District Court declined to give the prior arbitration award preclusive effect. (Tr. 68-69, DTr. 3-7, Pet. App. at 8-11). Instead, relying on this Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the court received the arbitrator's decision in evidence and permitted the parties to introduce extensive evidence about the arbitration process. (*E.g.*, Tr. 165-168, 237-247, DTr. 79-101, P. Ex. 34, Tr. 764-765, P. Ex. 35, J.A. 30, Tr. 764-765). Both attorneys discussed the decision and transcript in their closing argument. (*E.g.*, DTr. 184, 198). The jurors had the decision and transcript with them in the jury room during their deliberations. (DTr. 202, 259).

After a six-day trial, the jury found that Chief of Police Longstreet had discharged McDonald for exercising his First Amendment rights. (Pet. App. at A15). It awarded McDonald actual and punitive damages against Chief Longstreet. (Pet. App. at A16). The jury found against McDonald with regard to the remaining defendants. (Pet. App. at A2). The District Court entered judgment on the verdict. (Pet. App. at A6-A7).

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3. McDonald's complaint also alleged that the union had breached its state law duty to adequately represent him. The trial court declined to exercise pendent jurisdiction over this state law claim, and it is not before this Court. (Pet. App. at A2).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that "the district court should have applied res judicata and collateral estoppel principles to dismiss the Section 1983 action." (Pet. App. at A3). The court did not mention or distinguish this Court's decisions in *Alexander, Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), or *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), or its own decision in *Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S. Ct. 1432 (1983). Rehearing was denied on May 16, 1983. (Pet. App. at A14).

SUMMARY OF ARGUMENT

Actions under 42 U.S.C. §1983 should not be made an exception to the rule that an arbitration decision under a collective bargaining agreement will not bar a subsequent action to vindicate individual rights. This rule has been established by decisions of this Court and lower federal courts. Another panel of the Sixth Circuit has said that the rule applies to §1983 itself.

This rule is supported by three independent reasons and each of these reasons is fully applicable to §1983. First, the constitutional rights protected by §1983 are independent of the rights created by collective bargaining agreements. Their waiver may not be made a condition of public employment.

Second, the legislative history of §1983 demonstrates that it was intended to create a judicial remedy for violations of constitutional rights. That history also indicates that denial of redress in another forum was not intended to bar resort to the judicial remedy.

Third, the rights which Congress sought to protect under §1983 will not be as fully protected in arbitration proceedings. Arbitrators' place in the system of industrial self-government, their experience and their training make them ill-suited to the resolution of constitutional issues. As amply demonstrated in this case, arbitration provides few of the procedural protections otherwise available in §1983 actions. Union control of the arbitration process creates an unacceptable danger that the individual rights Congress sought to protect will be subordinated to the collective interest of the bargaining unit.

This Court's decision in *Allen v. McCurry* provides no foundation for granting preclusive effect to arbitration awards. Such awards are not subject to 28 U.S.C. §1738 and the reasoning of *Allen* cannot be stretched to cover them. Michigan courts do not permit arbitration decisions to bar subsequent actions to vindicate individual rights. Therefore, a federal court could not do so even if §1738 did apply. McDonald did not have a full and fair opportunity to litigate his constitutional claims in the arbitration proceedings. Finally, those claims were neither submitted to nor decided by the arbitrator.

ARGUMENT

I

Arbitration Decisions Do Not Preclude Subsequent Statutory Actions to Vindicate Individual Rights.

This case presents the issue of whether actions under 42 U.S.C. §1983 should be made a unique exception to the general rule that an arbitration award under a collective bargaining agreement will not bar a subsequent action to vindicate independent statutory rights. This Court has recognized this rule in actions under Title VII and in actions under the Fair Labor Standards Act. It has strongly implied the same result in actions to vindicate veterans' reemployment rights under the Universal Military Training and Service Act and in actions under the Seaman's Wage Act. Moreover, the lower courts have consistently held that arbitration awards do not bar various statutory actions. In fact, another panel of the Sixth Circuit has stated that the rule applies to suits under §1983 itself.

A. Decisions of This Court Establish That Arbitration Awards Should Not Be Given Preclusive Effect.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an adverse arbitration decision did not bar a subsequent Title VII action. *Alexander* provides a striking parallel to the present case. In each, the employer claimed there was "proper cause" for the discharge. *Id.* at 39; P. Ex. 8, J.A. 24. In each, the collective bargaining agreement contained a broad arbitration clause, *Id.* at 40; P. Ex. 42, Article XXI, J.A. 47-49, Tr. 587-588, and a clause making the arbitrator's findings "final and binding." *Id.* at 41-42; P. Ex. 42 §21.2 - Step 5, J.A. 49. In

each case, the plaintiff had filed a grievance which did not claim violation of his statutory rights. *Id.* at 39; P. Ex. 8a, J.A. 26, Tr. 158. In each, the arbitrator did not mention or rule on the statutory issue. *Id.* at 42-43; P. Ex. 35, J.A. 30, Tr. 764-765. In each case, the arbitrator denied the grievance, ruling that the grievant had been "discharged for just cause." *Id.* at 42; P. Ex. 35, J.A. 30 at 44. Finally, in each case, the employer urged that the arbitration award should preclude the employee from bringing a subsequent action to vindicate his civil rights.

In a number of respects, *Alexander* was a stronger case for preclusion than the present one. The collective bargaining agreement in *Alexander* contained an exceptionally broad arbitration clause which covered "any trouble aris[ing] in the plant" as well as disputes arising out of the meaning or application of the collective bargaining agreement. *Id.* at 40 (bracketed material in the original). The arbitration clause in the present case is more limited. It permits arbitration only of complaints involving "interpretation or application of, or compliance with" the agreement, P. Ex. 42 §21.0, J.A. 45 at 47, and only "to the extent necessary to decide the submitted grievance." P. Ex. 42 §21.2 - Step 5, J.A. 45 at 49. The "finality clause" in *Alexander* expressly provided that the decision was to be binding on the "Company, the Union, *and any employees involved.*" *Id.* at 41-42 (emphasis added). The clause in the present case makes no reference to employees and makes the decision binding only "on the parties." P. Ex. 42 §21.2 - Step 5, J.A. 45 at 49. In pre-arbitration proceedings, Alexander explicitly raised the claim that his discharge resulted from racial discrimination and he introduced evidence to support that claim. *Id.* at 42. In contrast, McDonald did not raise his First Amendment claims and submitted no evidence on them at arbitration.

Despite these facts, in *Alexander*, the Court firmly rejected the argument that prior arbitration under the collective bargaining agreement could preclude a subsequent action under Title VII. Since an employee's collectively bargained contractual rights were independent of his individual civil rights, he was entitled to seek to vindicate each in the appropriate forum. *Id.* at 49-50.

The Court pointed out that an arbitrator may interpret and apply a collective bargaining agreement only according to the needs and desires of the parties and the "common law of the shop." *Id.* at 53. If the arbitrator based his decision " 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Id.* at 53 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). The Court went on to say, "Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights of Title VII." *Id.* at 53-54.

The Court sharply distinguished an action to vindicate statutory rights from one claiming a violation of the collective bargaining agreement itself.

> "Under the Steelworkers trilogy, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.* at 54.

While rejecting any suggestion that an arbitration award could preclude the subsequent statutory action, the Court suggested that the award should be admitted into evidence and given such weight as the finder of fact deems appropriate. *Id.* at 60 and n.21. This was exactly what was done in the present case. Tr. 764-765, 165, 168, 237-247, DTr. 79-101.

The teachings of *Alexander* were confirmed in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In *Barrentine*, this Court held that arbitration awards cannot be given preclusive effect in actions under the Fair Labor Standards Act. The arbitration clause in that case was an extremely broad one requiring arbitration of "any controversy" between the parties. *Id.* at 736. Moreover, the subjects of the particular arbitration—wages and hours—were ones at the heart of the collective bargaining process. *Id.* at 738. Nonetheless, the Court rejected the argument that the employees' claims under the statute should be barred by the prior arbitration of their claims under the collective bargaining agreement.

> "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Id.* at 737.

The employees were permitted to pursue their statutory overtime claims even though the arbitrator had denied their contractual wage claims.

In two similar situations, this Court has refused to require employees to pursue their arbitral remedies before asserting their statutory claims in federal court. In *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 268-270 (1958), this Court held that a returning serviceman's rights under the Universal Military Training and Service Act could be asserted in federal court without first pursuing the contractual grievance and arbitration procedure. And, in *U. S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357 (1971), the Court held that a seaman need not submit his wage claim to contractual arbitration before suing for wages under the Seaman's Wage Act.

B. The Sixth Circuit Itself Has Said That Arbitration Should Not Preclude Actions Under 42 U.S.C. §1983.

Surprisingly, another panel of the Sixth Circuit has stated that the rule of non-preclusion should be applied to §1983 itself. In *Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S. Ct. 1432 (1983), the court stated:

> "In our view, *Gardner-Denver* should not be read as a restriction on the extent to which a Title VII *or section 1983* claimant is entitled to develop his evidence of discrimination." *Id.* at 142 (dictum as to §1983) (emphasis added); *accord Kern v. Research Libraries*, 27 FEP Cases 1007 (S.D. N.Y. 1979).

The Sixth Circuit's decision in the present case does not discuss, distinguish or even mention *Becton*. Pet. App. at A1-A5. It also did not mention *Alexander*, *Barrentine* or *Kremer*.

In *Becton*, the Court of Appeals also rejected the argument that arbitration decisions should have preclusive effect in subsequent §1981 proceedings.

> "[W]e reverse the District Court's holding that it was conclusively bound by the arbitration panel's decision that Becton was discharged for just cause. We hold instead that a federal court may, in the course of trying a Title VII or *section 1981* action, reconsider evidence rejected by an arbitrator in previous proceedings." *Id.* at 142 (emphasis added).

C. The Other Lower Courts Have Consistently Held That Arbitration Awards Should Not Be Given Preclusive Effect in Subsequent Actions Under the Reconstruction-Era Civil Rights Acts.

The decision in *Becton* is in accord with the uniform holdings of the lower courts that adverse arbitration awards should not preclude subsequent actions under the reconstruction-era Civil Rights Acts. *Kern v. Research Libraries*, 27 FEP Cases 1007 (S.D. N.Y. 1979) (42 U.S.C. §§1981, 1983 and 1985); *Liotta v. National Forge Co.*, 473 F. Supp. 1139 (W.D. Pa. 1979) (42 U.S.C. §1981), *modified on other grounds*, 629 F.2d 903 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Hawkins v. Babcock & Wilcox Co.*, 24 FEP Cases 794 (N.D. Ohio 1980) (42 U.S.C. §1981).[4]

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4. Like an action under Title VII, a suit under 42 U.S.C. §1981 may be barred by a *favorable* arbitration decision but only if the plaintiff receives relief which is "fully equivalent what he seeks under his statutory cause of action". *Strozier v. General Motors Corp.*, 635 F.2d 424 (5th Cir. 1981). (Applying the principles enunciated in *Alexander*, 415 U.S. at 51 n.4, to suit under §1981.)

In actions under other federal statutes, the courts have been equally unwilling to accord preclusive effect to prior arbitration awards. In *Marshall v. N. L. Industries, Inc.*, 618 F.2d 1220 (7th Cir. 1980), an arbitrator had issued an award reinstating the employee but denying him back pay. The employee had accepted the benefits of that award. Nonetheless, the Court of Appeals held that the arbitration decision did not bar a subsequent action by the Secretary seeking back pay for the same employee under §11(c) of the Occupational Safety and Health Act (29 U.S.C. §660(c)). The Third Circuit reached the same conclusion in an action seeking reinstatement and back pay on behalf of an employee under §105(c)(1) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(c)(1)). In *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981), the court held that an arbitrator's finding of just cause is not binding in an action challenging a discharge under MSHA. Similarly, the District of Columbia Circuit has held that the federal courts retain jurisdiction of claims under the Employee Retirement Income Security Act even if contractual claims arising out of the same transaction are subject to compulsory arbitration. *Air Line Pilots Association v. Northwest Airlines, Inc.*, 627 F.2d 272, 276-278 (D.C. Cir. 1980.)

II

Constitutional and Contractual Rights Have Distinctly Separate Natures and Legally Independent Origins. Each Should Be Enforced in Its Appropriate Forum.

As discussed in Part I, above, this Court has consistently ruled that arbitration awards under collective bargaining agreements should not bar subsequent actions to vindicate individual rights. It has recognized that there are three independent reasons for that rule. First, the

individual's statutory and constitutional rights are independent of his rights under the collective bargaining agreement. Second, Congress provided a judicial remedy for violations of those statutory and constitutional rights, and gave no indication that it intended prior arbitration to bar resort to that remedy. Third, the arbitration forum is less suited to the protection of those rights than are the courts. Each of these reasons is as applicable to §1983 as to Title VII or the FLSA. In this Part, we show that the rights protected by §1983 are distinct and independent from those protected by a collective bargaining agreement. In Part III, we show that the 42nd Congress, by enacting §1983, intended to create a judicial remedy to protect constitutional rights. In Part IV, we show that those rights would not be as adequately protected by arbitration as by judicial proceedings.

The constitutional rights protected under §1983 are distinctly individual rights. Moreover, this Court has consistently held that waiver of those rights may not be made a condition of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 514-515 (1980). Neither the city acting alone nor the city acting in concert with its employees could have required McDonald to choose between his First Amendment rights and his job. *Keyishian*, 385 U.S. at 605. Discharge for exercise of First Amendment rights is forbidden "regardless of the public employee's contractual or other claim to a job." *Sindermann*, 408 U.S. at 597. In *Sindermann*, this Court held that a public employee's "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim." *Id.* at 597-598.

What this Court said in *Alexander* and again in *Barrentine* is equally applicable here:

"In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under [the statute], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *Barrentine*, 450 U.S. at 745-746 (bracketed material in the original) (quoting *Alexander*, 415 U.S. at 49-50).

III

The 42nd Congress Intended That Constitutional Rights Be Protected Through Judicial Proceedings.

Giving preclusive effect to arbitration awards would defeat the intent of the 42nd Congress. Section 1 of the Civil Rights Act of 1871—the forerunner of §1983—was intended to provide a broad remedy for violations of federally protected rights. *Owen v. City of Independence*, 445 U.S. 622, 635-636 (1980); *Monell v. New York City Department of Social Services*, 436 U.S. 658, 683-687 (1978); Cong. Globe, 42d Cong., 1st Sess. 68 (1871) (Statement of Rep. Shellabarger) [hereinafter cited as Globe]. And Congress intended that the remedy be a judicial remedy. Congressman Dawes, a member of the committee which drafted the bill, stated:

"[W]hat is the proper method of thus securing the free and undisturbed enjoyment of these rights? . . . The first remedy proposed by this bill is a resort to the courts of the United States. . . . I submit to the calm and candid judgment of every member of this

> House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity if need be, but always according to the law and the fact, as that great tribunal of the Constitution." Globe at 476.

Another supporter of the bill explained that it was intended to provide "full and complete administration of justice *in the courts.*" Globe at 653 (Remarks of Rep. Osborne) (emphasis added).

Senator Edmunds, the manager of the bill in the Senate, made it clear that a judicial remedy was intended. He stated that the Act was intended "to interpose the calm force of law, through the judiciary . . .," and that it would "enforce the penalty imposed upon [unconstitutional acts] by the proper intervention of the judiciary . . . ." Globe at 691; *see also* Globe at 698.

The Act's opponents also understood that Section 1 provided a judicial remedy. For example, Senator Thurman stated that it left it "in the option of the person who imagines himself injured to sue in the State court or in the Federal court . . . ." Cong. Globe, 42d Cong., 1st Sess., App. at 216 (1871) [hereinafter cited as Globe App.]. He derided the Act on the basis that it left the definition of constitutional rights entirely "to judicial decisions." Globe App. at 216; *see also, e.g.*, Globe at 578 (Remarks of Senator Trumbull).

Both supporters and opponents of the Act indicated that, absent insurrection, the judicial remedy was to be the exclusive remedy for violations of constitutional rights. Senator Edmunds stated that the Act would be "a law to be enforced by the courts through the regular and ordinary processes *of judicial administration and in no other way*, until forcible resistance shall be offered to

the quiet and ordinary course of justice." Globe at 698 (emphasis added). Senator Trumbull, an opponent of the Act, expressed the contemporary understanding that the courts were the only permissible forums for vindication of Fourteenth Amendment rights.

> "[I]n regard to all the rights secured by the fourteenth amendment, however extended, in time of peace, *the courts are established to vindicate them, and they can be vindicated in no other way.* Sir, the judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free government." Globe at 578 (emphasis added).

While these remarks did not directly deal with arbitration, they provide a strong indication that Congress did not intend the judicial remedy to be supplanted.

The legislative history also indicates that victims of constitutional wrongs were to have access to the courts even if they had unsuccessfully sought relief elsewhere. Representative Coburn stated:

> "Obviously, the court of justice is the first instrument to be used in aid of the fourteenth amendment: safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention, the complaints of *those who are denied redress elsewhere*. Here may come the weak and poor and downtrodden, with assurance that they shall be heard. Here may come the man smitten with many stripes and ask for redress." Globe at 459 (emphasis added).

Thus, while the legislative history does not directly deal with arbitration, there is certainly "no suggestion in [it] that a prior arbitral decision either forecloses an individual's right to sue or divests the federal courts of jurisdiction." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

IV

Arbitration Is Not an Appropriate Forum to Provide the Expansive Protection of Constitutional Rights Intended by the 42nd Congress.

A. Arbitrators' Experience and Training and Their Role in Our System of Industrial Self-Government Make Them Inappropriate Decisionmakers in Cases Involving Individual Constitutional Rights.

The 42nd Congress could not have intended that Fourteenth Amendment rights be conclusively determined by arbitrators. As this Court has repeatedly stated, "arbitral procedures [are] less protective of individual statutory rights than are judicial procedures." *Barrentine*, 450 U.S. at 745; *Alexander*, 415 U.S. at 57-58. Arbitrators' special competence is "the law of the shop, not the law of the land." *Alexander*, 415 U.S. at 57; *Barrentine*, 450 U.S. at 743; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478 (1982). They have no more expertise in resolving constitutional issues under §1983 than in resolving discrimination issues under Title VII or wage and hour issues under the FLSA. Like Title VII, §1983 contains "broad language [which] frequently can be given meaning only by reference to public law concepts." *Alexander*, 415 U.S. at 57. Like FLSA cases, suits under §1983 involve questions which "must be resolved in light of volumes of

legislative history and [many] decades of legal interpretations . . . ." *Barrentine*, 450 U.S. at 743. Arbitrators—many of whom are not attorneys—have no presumed expertise in such matters. *Alexander*, 415 U.S. at 57 n.18; *Barrentine*, 450 U.S. at 743 n.21. Unlike state courts, arbitrators are not "charged with enforcing laws and . . . presumed competent to interpret those laws." *Kremer*, 456 U.S. at 478. They are selected because of their knowledge of the demands and norms of industrial relations—not their knowledge of constitutional rights. *Alexander*, 415 U.S. at 57.

Arbitrators are trained to consider factors which are entirely irrelevant to vindication of constitutional rights under §1983. An arbitrator considers "such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Yet, Congress could not have intended to permit infringement of constitutionally protected rights simply because doing so would improve morale, diminish tensions or increase productivity.

Unlike courts, arbitrators must enforce the private law created by the collective bargaining agreement rather than the public law established by the Constitution and §1983. Like the arbitrator in this case, most arbitrators have no authority to disregard the agreement or supplement it.[5] P. Ex. 42 §21.2 - Step 5, J.A. 45 at 49, Tr. 587-588. This Court has repeatedly held that an arbitrator's

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5. In this case, the arbitrator was not even permitted to interpret and apply the agreement except "to the extent necessary to decide the submitted grievance." (P. Ex. 42 §21.2 - Step 5; J.A. 45 at 49; Tr. 587-588).

duty is to apply the contract according to the intent of the parties rather than to apply principles of public law. *Warrior & Gulf Navigation*, 363 U.S. at 581; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-598 (1960); *Alexander*, 415 U.S. at 53, 56-57; *Barrentine*, 450 U.S. at 744; *Kremer*, 456 U.S. at 478. Moreover, if the arbitrator does base an award on his views of public law requirements, he has " 'exceeded the scope of the submission,' and the award will not be enforced." *Alexander*, 415 U.S. at 53 (quoting *Enterprise Wheel*, 363 U.S. at 597); *Barrentine*, 450 U.S. at 744.

The institutional limitations of arbitration as a remedy pose unacceptable risks that individual interests will be subordinated to collective interests. As one commentator —himself an experienced arbitrator—has stated:

> "They [the union and employer] select and pay the arbitrator, make the record before him, and sometimes seek clandestinely to supplement it. The arbitrator's future employment depends on his acceptability to them or to groups sharing their interests, as distinguished from the individual aggrieved by alleged discrimination. One need not accept Judge Hays's denigration of the arbitration process to recognize that there is some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, may distort adjudication even when there is complete harmony between the individual's interests and those of his representative. The danger of such distortion is obviously increased when the interests of the individual and the union conflict." Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 44 (1971).

B. Arbitration Procedures Provide Inadequate Protection to the Constitutional Rights Which Congress Sought to Protect.

Arbitration is not an appropriate forum for vindication of the constitutional rights Congress intended to secure, since it provides few, if any, of the pretrial, trial or appellate review protections provided in judicial forums. The arbitration record is not as complete. The rules of evidence are applied in a relaxed fashion or not at all. Discovery and compulsory process are often unavailable. *Alexander*, 415 U.S. at 57-58.

These deficiencies are strikingly demonstrated by the present case. One of the charges alleged that McDonald had made "a sexual assault on a minor female," but the charge did not give the name of the alleged victim or the date or location of the alleged assault. P. Ex. 9, J.A. 27, Tr. 160. As discussed in the Statement of the Case, the City refused to reveal this information despite at least six separate requests for the particulars. Until the alleged victim was called to the stand in the arbitration hearing itself, McDonald did not know who he was supposed to have assaulted or when or where he was supposed to have assaulted her. Tr. 166, 235-236, 261-262, 535-536, 706-707, 715-716, 719-720, DTr. 89, 117.

Without discovery, McDonald was unable to learn of the existence of at least two crucial documents, each of which cast serious doubt on the City's case. First, he was unable to discover or examine Plaintiff's Exhibit 10—Chief Longstreet's signed investigative report on the "Dack incident." Tr. 536; P. Ex. 10, J.A. 28, Tr. 505-506. That report showed that, on October 30, the Chief had personally interviewed the alleged victim, that she had said nothing about a sexual assault, and that the chief had concluded

that there was no reason for further investigation. P. Ex. 10, J.A. 28, Tr. 505-506; Tr. 498-502, DTr. 36-38, 48-50. The contents of the report raised serious questions about the chief's motivations and Mrs. Dack's credibility. It was available in the federal trial but not in the arbitration.

Similarly, McDonald was unable to discover or examine Plaintiff's Exhibit 11—the notes from which his discharge notice was prepared. P. Ex. 11, Tr. 526, 562. These notes, although supposedly setting forth the reasons for the discharge, did not mention Barbara Dack or any incident of sexual assault. The notes—prepared by the chief himself—cast serious doubt on his claim that the "Dack incident" was the real reason for McDonald's discharge. They were available in the federal trial but not in the arbitration.

An additional deficiency in the arbitration process is that "arbitrators very often are powerless to grant the aggaggrieved employees as broad a range of relief" as Congress authorized. *Barrentine*, 450 U.S. at 745. Under §1983, a court can award actual damages and, in appropriate cases, punitive damages. *Carey v. Piphus*, 435 U.S. 247 (1978); *Smith v. Wade*, ... U.S. ....., 103 S. Ct. 1625 (1983). Actual damages may include damages for emotional distress. *Carey*, 435 U.S. at 264. The court can award reasonable attorney's fees and costs. 42 U.S.C. §1988. An arbitrator's remedial power is far more limited. He is confined to interpretation and application of the collective bargaining agreement and can issue only such relief as is authorized by it. *Barrentine*, 450 U.S. at 745. "It is most unlikely that he will be authorized to award [punitive] damages, costs or attorney's fees." *Id.* It is equally unlikely that he would be authorized to award compensation for losses not directly related to loss of employment, such as emotional distress or injury to reputation.

Finally, judicial review of arbitration awards is far more limited than appellate review of judicial decisions. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-599 (1960). As discussed above, there is no reason to believe that Congress intended that §1983 cases be tried in any non-judicial forum. It is even less likely Congress intended they be tried in such a forum if its decisions would be less thoroughly reviewed than those of a state or federal court. *Accord Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278, 283 (1980) (Michigan law).

C. Union Control of the Arbitral Process Poses Unacceptable Risks to the Rights of §1983 Claimants.

Arbitration is an inappropriate forum for vindication of individual constitutional rights because arbitration is controlled, shaped and administered by the union—not the individual. While union control is appropriate when the rights to be vindicated are those created and defined by the union's contract, such control poses different and unacceptable risks when individual constitutional or statutory rights are involved. As this Court stated in *Alexander*:

> "A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the collective bargaining unit." 415 U.S. at 58 n.19.

Similarly, in *Barrentine*, the Court expressed its concern that, "even if the employee's claim were meritorious,

his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration." 450 U.S. at 742.

In disputes *under the collective bargaining agreement*, it may be acceptable to risk the subordination of the individual's interests to those of the majority of his co-workers. Collective bargaining is a "majoritarian process." *Alexander*, 415 U.S. at 51. The rights conferred by the agreement are collective rights achieved by collective struggle and may be sacrificed for the collective good. *Barrentine*, 450 U.S. at 735; *Alexander*, 415 U.S. at 51.

However, the rights protected under §1983 are distinctly individual rights. Waiver of those rights may not be made a condition of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 514-515 (1980). Neither the city acting alone nor the city acting in concert with its employees could have required McDonald to choose between his First Amendment rights and his job. *Keyishian*, 385 U.S. at 605. Discharge for exercise of First Amendment rights is forbidden "regardless of the public employee's contractual or other claim to a job." *Sindermann*, 408 U.S. at 597. Just as the union may not subordinate those rights to the perceived common good during collective bargaining, it should not be permitted to do so during grievance arbitration.

As the court recognized in *Alexander*, there is special reason to be concerned about the union's control of arbitration when the dispute involves civil rights. 415 U.S. at 58 n.19. Section 1983 is frequently used to protect the rights of public employees whose speech or beliefs or associations are as unpopular with their co-workers as with

their employers. It is invoked to protect the public employment rights of racial and religious minorities and of women. It is often invoked to protect the rights of the perceived "trouble-maker" who union and management both want out of their way so that business as usual may proceed. As one supporter of the Civil Rights Act asked, "What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?" Globe at 394 (Statement of Rep. Rainey).

Even where the interests of the employee and the unior appear to coincide, there are often significant differences. The union may legitimately conclude that preserving a harmonious collective bargaining relationship is more important than prevailing in the particular grievance. It may conclude that the interests of an individual employee do not justify expending the resources necessary to fully protect those interests. It may prefer to avoid setting a procedural precedent which, although beneficial to the particular employee, would be harmful to the union in future arbitrations.

Some of the dangers posed to individual rights by the union's control of the arbitration process are well illustrated by the present case. McDonald was not permitted to have his own lawyer at the arbitration and was represented by a lawyer assigned by the union. Tr. 238. McDonald had little if any contact with that lawyer before the arbitration hearing. Tr. 241. At the hearing, McDonald urged the union to call Officer Louis Osten as a witness in his behalf, but the union refused to do so. Tr. 165-166. Officer Osten was a crucial witness regarding the "Dack incident," since he had been with McDonald at the time of the alleged sexual assault. Tr. 165-

166, 343, DTr. 31. In the federal trial, he testified unequivocally that no such assault occurred and that McDonald neither touched Mrs. Dack nor said anything offensive to her. Tr. 343-346; 354. His testimony was persuasive corroboration of McDonald's and would have been of considerable value in the arbitration.

V

Allen v. McCurry Provides No Foundation for Giving Preclusive Effect to Arbitration Decisions.

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court held that, under 28 U.S.C. §1738, the federal courts should give preclusive effect to prior decisions of state courts in certain circumstances. Under *Allen*, preclusion is inappropriate in this case for at least four independent reasons. First, 28 U.S.C. §1738 does not apply to arbitration awards. Second, if §1738 were invoked, the preclusion law of Michigan would apply and Michigan does not give preclusive effect to arbitration awards in subsequent statutory actions. Third, the arbitration proceedings did not provide McDonald with a full and fair opportunity to litigate his claim. Fourth, McDonald did not present his constitutional claims to the arbitrator and the arbitrator did not pass on them.

A. Arbitration Awards Are Not Subject to the Mandate of 28 U.S.C. §1738 and the Reasoning of *Allen* Cannot Be Stretched to Cover Them.

Less than two years ago, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 477 (1982), this Court unquivocally stated, "Arbitration awards, of course, are not subject to the mandate of [28 U.S.C.] §1738." The reasons for the Court's confidence are apparent on the face of the statute. It provides:

> "The records and *judicial proceedings of any court* of any such State . . . shall be proved or admitted *in other courts* within the United States . . . by the attestation of the clerk and *seal of the court* annexed, if a seal exists, together with a certificate *of a judge of the court* that the said attestation is in proper form.
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> "Such Acts, records and *judicial proceedings* . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the *courts* of such State . . . from which they are taken." 28 U.S.C. §1738 (emphasis added).

The Court expressly distinguished *Alexander* and explained that the reasons for giving preclusive effect to court decisions did not apply to arbitration awards. *Kremer*, 456 U.S. at 477-478. In addition, while stating that state agencies were more competent to resolve civil rights cases than arbitrators, the Court refused to give preclusive effect to state agency proceedings. *Id.* at 470 n.7.

Moreover, the reasoning of *Allen* simply cannot be stretched to cover arbitration. For example, the *Allen* Court stated that preclusion would "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." 449 U.S. at 96. But principles of state-federal comity are not implicated by denying preclusive effect to decisions of arbitrators since they are creatures of private agreement rather than state law. The Court stated that the debates on the Act contained reference "to the concurrent jurisdiction of the state courts over federal questions." *Id.* at 99. But there are no such references to arbitration. It noted the "constitutional obligation of the state courts to uphold federal law, and [the Court's] confidence in their ability to do so." *Id.* at 105. But arbitrators have no such obligation

and the Court has repeatedly emphasized its serious doubts about arbitrators' ability to resolve public law issues.[6] *Kremer*, 456 U.S. at 477; *Alexander*, 415 U.S. at 52-54; 56-59; *Barrentine*, 450 U.S. at 742-745.

B. Michigan Courts Do Not Give Awards Preclusive Effect in Actions to Vindicate Individual Rights.

Preclusion is also inappropriate since the courts of Michigan would not give preclusive effect to the award in this case. As the unanimous Court said in *Haring v. Prosise*, ... U.S. ....., ... n.6, 103 S. Ct. 2368, 2373 n.6 (1983):

> "If the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy' under §1738. *Union & Planters' Bank of Memphis v. Memphis*, 189 U.S. 71, 75 (1903)."

Michigan courts do not give arbitration awards preclusive effect in subsequent suits to vindicate individual rights. The state's public policy strongly favors recognition of overlapping and cumulative remedies for violations of civil rights. As a result, Michigan courts have

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6. *Allen* simply did not deal with arbitration. Its repeated references to state *courts* shows it was concerned only with the effect of prior decisions of courts. *E.g.*, *Id.* at 96 (Under §1738, Congress required the federal courts to "give preclusive effect to state-court judgments . . . ."); *Id.* at 97 (In 1871 preclusion could have applied "following state-court litigation . . . ."); *Id.* at 98 (Section 1983 "says nothing about the preclusive effect of state-court judgments."); *Id.* at 99 (Legislative history provides only limited support for denying preclusion "where state courts have recognized the constitutional claims . . . ."); *Id.* (Congress was not "subtracting from [the jurisdiction] of the state courts."); *Id.* at 101 (Congress did not intend to forbid preclusion "after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.")

consistently refused to give preclusive effect to arbitration awards in actions to enforce an individual's statutory or constitutional rights. Moreover, since there is no Michigan public policy favoring public sector grievance arbitration, preclusion is even less appropriate in this case than it was in *Alexander* and *Barrentine*.

1. Michigan Public Policy Favors Cumulative Remedies to Vindicate Civil Rights.

Michigan courts have repeatedly held that the public policy of the state favors the existence of overlapping and cumulative remedies for the vindication of civil rights. In *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 64 Mich. App. 393, 235 N.W.2d 791, 798 (1975), the court stated that Michigan recognized the appropriateness of "cumulative and overlapping remedies in the most important context of civil rights . . . ." In *Chrysler Corporation v. Michigan Civil Rights Commission*, 68 Mich. App. 283, 242 N.W.2d 556, 559 (1976), the court stated:

> "We are not inclined to disregard the recent recognition given to the independence of employees' contractual and constitutional or statutory rights to be free from discrimination in employment."

Similarly, in *Hernden v. Consumer Power Co.*, 72 Mich. App. 349, 249 N.W.2d 419, 421 (1976), the court stated, "Decisions since *Pompey* . . . have stressed the independence in scope, purpose and source of statutory, civil and contractual remedies for alleged discrimination in private employment."[7]

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7. In the seminal case of *Pompey v. General Motors Corporation*, 385 Mich. 537, 189 N.W.2d 243 (1971), the Michigan Supreme Court held that, even though the state had passed a com-

(Continued on following page)

2. Michigan Courts Refuse to Give Arbitration Awards Preclusive Effect in Actions Under Statutes Protecting Individual Rights.

As a result, Michigan courts have consistently held that, in actions to vindicate constitutional or statutory rights, prior arbitration awards will not be given preclusive effect. A prior arbitration award does not prevent a subsequent action under the Michigan Fair Employment Practices Act. Similarly, the Michigan Supreme Court has held that the state equivalent of the NLRB (the Michigan Employment Relations Commission or "MERC"), is not permitted to defer to arbitration. We have been unable to identify a single decision in which a Michigan court has held that an action to vindicate an employee's statutory or constitutional rights was barred by a prior arbitration award.[8]

In *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 64 Mich. App. 393, 235 N.W.2d 791, 797-798 (1975), the court embraced the reasoning and holding of *Alexander v. Gardner-Denver Co.* and held that a prior adverse arbitration award would not be given *res judicata* effect in a subsequent action under the Michigan Fair Employment Practices Act. The court stated

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Footnote continued—

prehensive Fair Employment Practices Act, an employee could maintain a separate civil action for employment discrimination. The importance of fully protecting civil rights justified creation of this cumulative remedy even though no such cause of action existed at common law. 189 N.W.2d at 249-255.

8. Of course, Michigan courts have held that an arbitration award could be conclusive in a subsequent action *under the collective bargaining agreement*. However, as discussed below, they have consistently recognized the distinction between employees' collectively bargained contractual rights and their individual statutory and constitutional rights.

that Michigan favored "cumulative and overlapping remedies" for violations of civil rights. It recognized that an employee's contractual and statutory rights "have legally independent origins" which can be separately vindicated in separate proceedings.

Similarly, the Michigan Supreme Court has held that MERC may not defer unfair labor practice cases to arbitration. In *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1980), the court held that "our state's public policy is best served when public employment disputes, *implicating statutory rights*, are resolved under a system which provides significant procedural, and appellate review, protections." 293 N.W.2d at 283 (emphasis added). The court rejected the NLRB's practice under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1965), of deferring to contractually established grievance arbitration. Instead, it held that public employees were entitled to have their statutory unfair labor practice charges heard under the statutorily established procedure.

In a similar situation, MERC held that a city which had a collectively bargained grievance procedure as well as an identical civil service hearing procedure was required to process a discharge under both. In *City of Grand Rapids*, 1975 MERC Lab Op 102 (1975), MERC held that a city's failure to provide the hearing required by the collective bargaining agreement was an unfair labor practice even though the city had already provided an identical hearing under its civil service rules. It rejected the argument that this gave the employee "two bites at the apple," reasoning that the grievance procedure hearing was only the union's "bite" and the civil service hearing was the employee's "bite." *Id.* at 109.

3. The Absence of Any Michigan Public Policy Favoring Public Sector Grievance Arbitration Militates Against Granting Preclusive Effect to the Award in This Case.

Michigan's refusal to give prior arbitration awards preclusive effect in suits to vindicate statutory rights follows logically from the fact that there is no Michigan public policy favoring public sector grievance arbitration. The absence of such a policy makes preclusion even less appropriate in this case than it was in *Alexander* or *Barrentine*.

In *Detroit Fire Fighters*, the Michigan Supreme Court specifically rejected the argument that the state's public policy favored public sector grievance arbitration. The dissent had argued that Michigan law favored arbitration of grievances. 293 N.W.2d at 300-301 (Williams, J., dissenting). But the majority, while agreeing with the dissent that the state had manifested a preference for grievance arbitration "in the *private sector*," found no such preference in the public sector. *Id.* at 281 (emphasis supplied by the court). The court pointed out that while the title to the private-sector Labor Mediation Act (M.C.L. §423.1 *et seq.*; M.S.A. §17.454(1) *et seq.*) specifically referred to arbitration, there was no such reference in the state's Public Employment Relations Act. 293 N.W.2d at 281. The court also explained that, in situations in which the state had intended the use of arbitration in the public sector (for "interest" or contract formation arbitration), the legislature had provided for it explicitly. *Id.* at 281-282. The court concluded that deferral to arbitration was forbidden. The court rejected even limited deferral of the type given by the NLRB under the *Collyer-Spielberg* doctrine. *Id.* at 280-281.

In *Alexander* and *Barrentine*, the reasons for denying preclusive effect to arbitration awards had to be weighed against the strong federal policy favoring arbitration of private-sector grievances. 415 U.S. at 46; 450 U.S. at 734-736. Nonetheless, preclusion was denied. Since Michigan has no such policy regarding public-sector grievances, there is even more reason to deny preclusive effect to the arbitration award in the present case."

Like the federal courts, Michigan courts recognize that arbitration awards may conclusively determine an employee's rights *under the collective bargaining agreement*. However, they have repeatedly articulated the distinction between those rights and the independent rights conferred on individual employees by legislative action. In *Michigan Civil Rights Commission ex rel. Boyd*, 235 N.W.2d at 798, the court stated that contractual and statutory rights have "legally independent origins." In *City of Grand Rapids v. Grand Rapids Lodge No. 97, Fraternal Order of Police*, 415 Mich. App. 628, 330 N.W.2d 52 (1982), the court stated:

> "We note that while a union may bargain away collective rights, individual rights of employees may not be bargained away. See, *e.g.*, *Alexander* (Title VII right to equal employment opportunities); *NLRB v. Magnavox Co.* (employee's right to choose bargaining agent); *Barrentine v. Arkansas-Best Freight System, Inc.* (right to overtime pay under the Fair Labor Standards Act); *Employment Security Comm. v. Vulcan Forging Co.*, 375 Mich. 374, 134 N.W.2d 749 (right to unemployment compensation)." 330 N.W.2d at 55 n.6 (citations omitted).

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9. Since public employers are excluded from the Labor Management Relations Act, there is no federal public policy favoring arbitration of public employee grievances. 29 U.S.C. §152(2).

C. McDonald Was Not Given a Full and Fair Opportunity to Litigate His Constitutional Claims.

Of course, even a state court judgment is not given preclusive effect if the party did not have a "full and fair opportunity to litigate the claim . . . ." in that court. *Allen*, 449 U.S. at 101. It may be that the teaching of *Kremer, Alexander* and *Barrentine* is that arbitration does not, as a matter of law, ever provide such an opportunity. McDonald certainly had no such opportunity.

At a minimum, a full and fair opportunity to challenge a termination based on charges of misconduct requires "timely and adequate notice detailing the reasons for [the] proposed termination." *Goldberg v. Kelly*, 397 U.S. 254, 267-271 (1970). As discussed in detail in the Statement of the Case, McDonald was required to defend a charge that, at an unidentified place and on an unspecified date, he had assaulted an un-named female. Despite at least six requests for the particulars of the charges, the city refused to reveal who it was he was supposed to have assaulted or where or when he was supposed to have assaulted her. He learned this information only when the alleged victim testified at the hearing itself. Even under the most charitable construction, this is far from "timely and adequate notice."

Moreover, crucial exculpatory evidence was not disclosed by the City. As discussed in Part IV B, above, the City failed to disclose the existence of an investigative report—signed by Chief Longstreet—which cast serious doubt on the credibility of the alleged victim. It also failed to disclose Plaintiff's Exhibit 11, the Chief's handwritten notes which indicated that the "Dack incident" was a *post hoc* pretextual justification for the discharge.

A full and fair opportunity to be heard requires that the opposing party not conceal evidence. *Precision Fittings, Inc.*, 141 NLRB 1034 (1963) (arbitration proceedings not fair and regular if evidence is deliberately withheld from the arbitrator).

Finally, the arbitration hearing was not full and fair because McDonald did not control his own defense. *Cf., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The disastrous decision not to call Officer Osten was made by the union over McDonald's protests. Tr. 165-166.

D. McDonald Did Not Present His Constitutional Claims to the Arbitrator and the Arbitrator Did Not and Could Not Decide Them.

The arbitration award cannot preclude McDonald's First Amendment claims since those claims were not presented to or decided by the arbitrator. Respondents have acknowledged that McDonald's constitutional claims were not presented either before or at the arbitration hearing. Respondents' Brief In Opposition at 6-7, 10. Neither the grievance nor the submission to arbitration ever mention those claims. P. Ex. 8A, J.A. 26, Tr. 158; P. Ex. 31, J.A. 29, Tr. 763. The arbitrator's decision does not purport to resolve them. P. Ex. 35, J.A. 30, Tr. 764-765. He had no jurisdiction to do so since the collective bargaining agreement gave him authority to interpret and apply the contract only "to the extent necessary to decide the submitted grievance." P. Ex. 42, §21.2 - Step 5, Tr. 587-588.

In *Migra v. Warren City School District Board of Education*, No. 82-738 (U.S. *cert. granted*, Jan. 10, 1983), this Court is considering whether a §1983 plaintiff may litigate in federal court an issue which he might have,

but in fact did not, raise in a prior state court action. A decision denying preclusion in *Migra* would dictate the same result here. But the opposite decision in *Migra* would not control this case.

Where a plaintiff with both a state law claim and a claim under §1983 must choose between filing suit in federal or state court, neither option forces him to surrender either of his claims. His federal claim under §1983 is cognizable in state court. *Martinez v. California*, 444 U.S. 277 (1980). His state claim can be heard in federal court under pendent jurisdiction. (Even if abstention is invoked, he will still have an opportunity to present his state claim in the state court. It will not be lost.)

But if such a plaintiff must choose between federal court and arbitration, one of his claims will be jeopardized whichever forum he chooses. If he elects to sue in federal court under §1983, he will forfeit his contractual rights since he will have foregone the contractually established arbitral remedy. If both claims are to be heard at all, they could only be heard in the arbitral forum. Thus, he must choose between foregoing his contractual right by filing suit in federal court or jeopardizing his constitutional rights by attempting to vindicate them in an inappropriate forum. The likely outcome would be an increase in the federal courts' caseload as individuals choose to bypass arbitration to protect their constitutional rights.

Since McDonald's constitutional claims were neither presented to nor decided by the arbitrator, NLRB's *Spielberg* deferral doctrine—even if applicable to §1983—would not govern this case. In *Suburban Motor Freight, Inc.*, 247 NLRB 146, 146-147 (1980), the Board held:

> "[W]e will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. . . . [W]e will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions. . . . [W]e shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator."

In addition, the NLRB would not defer in this case since, as discussed in Part V C above, the arbitration proceedings were not "fair and regular." *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955). For reasons amply set forth in Part V of *Alexander*, neither the *Spielberg* doctrine nor a more strictly limited deferral doctrine should be adopted for §1983. 415 U.S. at 55-61.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 83-219

In The
Supreme Court of the United States
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GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

1. Should unappealed arbitration awards—as distinguished from state court decisions—be given preclusive effect in cases brought under 42 U. S. C. § 1983?

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No. 83-219

In The

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October Term, 1983

GARY McDONALD,

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vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Respondents will not submit a separate statement of the case, but wish to expand upon and clarify certain specific points.

McDonald did, indeed, file a grievance under the union collective bargaining agreement claiming a violation of article 3 of the union contract. (J.A. 26)

Article 3, § 3.0 of the union contract provides that the City has the right to " . . . demote, suspend or discharge

employees for proper cause". (J.A. 47) No mention was made in the grievance of any violation of article 1, § 1.2, entitled "No Discrimination Because of Union Activities". (J.A. 46)

Nor did the plaintiff claim at the arbitration hearing that his discharge was in retaliation for union activities.

Testimony was taken at arbitration with regard to charges 6 and 7.[1] The arbitrator did consider whether or not McDonald was discharged for making disrespectful, derogatory or slanderous remarks; for falsely accusing the chief of police; or for attempting to undermine the authority of the chief. He determined that although such expressions were outspoken and tactless, they could not be just cause for discharge. (J.A. 40-41)

McDonald's claim in federal court was not that his constitutional right to free speech was violated by his discharge, but that he was fired for "union activities". (J.A. 5)

The question asked on the special interrogatory directed to the jury was whether or not he was discharged from his position as a police officer in retaliation for, or to suppress, his union activity, and, therefore, in violation of his first amendment right to freedom of speech or association. (J.A. 15)[2]

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[1]Charge 6 was disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials. Charge 7 was falsely accusing the chief of police of indecent conduct in attempting to undermine his authority; also a slow-down in enforcement action.

[2]The above reference is to the appendix to the printed petition for writ of certiorari.

Whether McDonald's union activities prompted the firing was not submitted to the arbitrator and he did not consider it.

We take issue with petitioner's statement that the defendant refused to reveal the name of the minor female and the place of the "sexual assault" to McDonald until the arbitration hearing.

After the submission was made to arbitration on February 9, 1977, McDonald was represented by two attorneys provided by the union.

Mr. Jennings, City Attorney, testified at trial that no request was ever made to the arbitrator or to him for any specific details regarding the names of the complainants. (Tr. 716-717)

There was no objection at the arbitration hearing in July, 1977, that McDonald was not prepared to proceed. (D Tr. 96)

In response to the charge that the city failed to disclose to McDonald the investigative report on the "Dack" incident concluded on October 30, 1976, it should be noted that although the "Dack" incident had been closed on that date, as stated by petitioner, the basis of the "Dack" charge was renewed subsequent to that date by a written statement of Barbara Dack given to Gloria Oswald on November 23, 1976. (Tr. 497, 502)

At the conclusion of the six-day trial, the jury found for McDonald against Chief Longstreet only. The jury also found that plaintiff was not deprived of a due process hearing concerning his discharge.

The Sixth Circuit Court of Appeals found no abuse of process. (A. 3)

SUMMARY OF ARGUMENT

Neither 42 U. S. C. § 1983's legislative history or case law suggests that Congress intended to override 28 U. S. C. § 1738. Rather, they evidence an intent to prevent a § 1983 plaintiff from relitigating a claim resolved against him when there is no evidence of an unwillingness or inability on the part of the state to protect the claimant's federal rights.

The "full faith and credit" clause, 28 U. S. C. § 1738, as interpreted by this court in *Allen v. McCurry*, 449 U. S. 90 (1980), dictates that preclusive effect must be applied by the federal courts to state court decisions whenever the state from which the judgment emerged would do so.

In Michigan, a valid and final arbitration award becomes the law of the case subject only to judicial vacation and has the same effect for purposes of claim preclusion as does a court judgment.

Michigan adheres to the proposition set forth in the Restatement of the Law of Judgments, 2d, § 27, that when an issue is actually litigated and a determination is made in a valid and final judgment, that determination is conclusive as to the parties in any subsequent suit.

A binding arbitration proceeding to resolve a dispute between an employer and an employee in accordance with a collective bargaining agreement provides an inexpensive, efficient and expeditious resolution of a labor grievance.

Labor has an acknowledged interest in McDonald's *individual and collectively* bargained-for contractual right

to be free of discrimination on account of his union activities.

The ruling in *Alexander v. Gardner-Denver Company*, 415 U. S. 36 (1974), does not govern the disposition of this case. Title VII of the Civil Rights Acts of 1964 was designed to eradicate discriminatory employment practices based on race, color, religion, sex and national origin. Unlike 42 U. S. C. § 2000e, *et. seq.*, § 1983 does not apply to purely private discrimination or deprivation of rights.

Petitioner's argument that the phrase "final responsibility" in *Alexander v. Gardner-Denver Company* means that Title VII complainants are entitled to *de novo* federal review ignores this Court's more recent decision in *New York Gaslight Club, Inc. v. Carey*, 447 U. S. 65 (1980). Initial resort should be made to state and local remedies. Recourse to a federal forum is only appropriate when the state does not provide an adequate due process remedy.

§ 1983 actions are intended to supplement and not supplant state remedies. The mere fact that the petitioner asserts a federal claim does not assure him a day in federal court, nor does precluding a litigant from a trial *de novo* in federal court mean that the petitioner was deprived of a judicial forum.

As a matter of public policy, federal courts should not relitigate issues once determined in arbitration proceedings which provide due process.

ARGUMENT

I.

Petitioner's interpretation of 28 U. S. C. § 1738 and 42 U. S. C. § 1983 contravenes public policy and the intent of Congress to preclude judicial review absent abuse of process.

This Court in *Allen v. McCurry*, 449 U. S. 90 (1980), held that the preclusion rule emanating from the full faith and credit clause of the United States Constitution, U. S. Const. art. IV, § 1, applies to § 1983 litigation.

The implementing legislation, § 1738, applies to both federal and state courts. Preclusion effect will be withheld from state court decisions only in the event the state court has evidenced an unwillingness or inability to protect the claimant's federal rights. This allows redress in the event of inferior state remedies.

This statute was enacted just after ratification of the Constitution, Act of May 26, 1790, ch. 11, 1 Stat. 122; reenacted soon after, Act of March 27, 1804, ch. 56, 2 Stat. 298-299; and has been virtually unchanged since its enactment. *Allen v. McCurry* recently reaffirmed this Court's traditional position that under § 1738, federal courts are *required* to give preclusive effect to state court judgments whenever the court of the state from which the judgment emerges would do so.

Nothing in the legislative history of § 1983, or the Civil Rights Act of 1871, shows any congressional intent to deny binding effect to a state court determination where the state court has acted within its proper jurisdiction and has afforded the litigant a full and fair opportunity to raise federal claims, thereby showing itself

to be willing and able to protect the federal rights of its citizens. *Allen v. McCurry, supra.*

This principle is inapplicable only when state substantive law is facially unconstitutional; where the state procedural law is inadequate to allow full litigation of the constitutional claim; or where the state procedural law, though adequate in theory, is inadequate in practice. *Monroe v. Pape,* 365 U. S. 167, at 173-174 (1961).

Furthermore, *Allen* holds that every grievant is not entitled to one unencumbered opportunity to litigate his claim in a federal court regardless of the legal posture in which the federal claim arises.

A.

Alexander v. Gardner-Denver Company is not binding precedent, nor conclusively persuasive, in § 1983 suits.

Unlike 42 U. S. C. § 2000e, *et seq.*, § 1983 does not apply to purely private discrimination or deprivation of rights.

The goal of the Civil Rights Act of 1871, now § 1983, was to combat the corrupting influence of the Ku Klux Klan in the state courts and law enforcement agencies in the southern states. The primary concern was that the state courts had been ineffective in protecting federal rights. *Allen v. McCurry, supra.*

The core language in § 1983 is:

> "Every person who, *under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia,* subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or im-

munities secured by the Constitution and laws, . . ." (Emphasis added.) 42 U. S. C. § 1983.

Title VII of the Civil Rights Act of 1964, on the other hand, is an implementation of a national policy to assure equality of employment opportunities without discrimination in respect to race, color, religion, sex or national origin. *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454 (1975). Adopted almost 100 years after the "Ku Klux Klan" Act, its purpose was to prohibit private discrimination in employment.

In Title VII cases, employers, labor organizations, employment agencies, as well as certain labor and management committees are the "persons" forbidden to discriminate. 42 U. S. C. § 2000e-2.

The legislative history affirms the congressional intent to seek ways in which an *individual* complainant could be assured of a full and adequate statutory and judicial remedy. The result was a work-sharing concept wherein the Equal Opportunity Employment Commission would work with the state agencies. The law gave the federal courts the ultimate responsibility for reviewing the adequacy of the state remedies and procedures on a case-by-case basis after the state proceedings had ended. Thus, as stated in *Allen*, the preclusion doctrine is the tool which the federal courts may use to dispose of those cases which are "fully and fairly litigated".

In those instances where the state remedies conform to Title VII substantive standards, res judicata or collateral estoppel may preclude complainants from seeking additional relief under Title VII. This philosophy was reiterated in *New York Gaslight Club, Inc. v. Carey, supra.*

Congress, in enacting § 1983, was cognizant of the fact they were altering the balance of judicial power between the states and the federal government. The thread that ran through the debates was that it should encompass the philosophy that state courts would retain their jurisdiction so that when the perceived discriminations had abated, the balance of judicial power would, in effect, be as originally envisoned.[3] *Martinez v. California,* 444 U. S. 277, 283-284, n. 7 (1980).

Unlike Title VII, § 1983 does not mandate that the federal courts provide *de novo* review of issues raised, or which could have been raised, in state proceedings. Thus, federal courts in § 1983 cases, as opposed to Title VII cases, supplement, not supplant, state remedies by assuming jurisdiction in the event a complainant does not have access to a full and adequate remedy. There is no mandate that federal courts be the last resort for a civil rights remedy, *Alexander v. Gardner-Denver Company* notwithstanding.

B.

Non-deferral policies established by this court in FLSA cases are not binding in § 1983 actions.

It is certainly true that this Court has applied the *Alexander* holding on non-deferral to arbitration in other cases. *Barrentine v. Arkansas-Best Freight Company,* 450 U. S. 728 (1981). However, *Barrentine* does not compel the same result in this case.

Arkansas-Best argued that because this was a wage dispute, it clearly came within the four corners of the col-

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[3]Note that state courts may entertain § 1983 claims.

lective bargaining agreement. The district court noted that if the collective bargaining agreement was read literally, it would require compensation for the time petitioners were on company business doing pre-trip safety inspections. However, this Court held that such construction misperceived the nature of the petitioner's FLSA claim. 29 U. S. C. § 201 *et seq.*

The majority ruled that FLSA was designed specifically to give minimum protection to *individual* workers and to ensure that *each* employee covered by the Act receives a fair day's pay for a fair day's work. The Court denied preclusion noting that no other form for enforcement of the statutory right is referred to or created by the statute. *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697 (1945).

The underlying principle in FLSA was to encourage employees to enforce their rights in court, thereby furthering the public policies underlying the FLSA. It is obvious that this Court equated an individual's rights to non-discrimination in employment practices to an individual's right to a minimum wage and to overtime pay under the FLSA. These are both uniquely individual rights in employment which apply to private discrimination or private deprivation of rights which cannot be waived or abridged under contract. Nonetheless, the court acknowledged that ". . . courts should defer to an arbitral decision where the employee's claim is based on rights arising out of a collective-bargaining agreement. . . ." *id.* at 737.

C.

Federal courts may defer to state court proceedings in Title VII cases.

This Court evidenced its support for the concept of a cooperative effort maximizing the cooperation between federal and state enforcement proceedings in its decision in *New York Gaslight Club, Inc. v. Carey, supra.*

It allowed attorneys' fees to be awarded to the prevailing party for services rendered in a state administrative proceeding enforcing Title VII.

Rejecting the argument that § 706(k)[4] referred only to federal proceedings, this Court emphasized the need to encourage *state* participation in the enforcement of the objectives of Title VII.

In *New York Gaslight Club,* the federal court deferred to an "adequate" state administrative decision. Justice White, speaking for this Court, opined that when, under New York law, the petitioner would be precluded from relitigating the same grievance in that state's courts, § 1738 precludes relitigating the same question in federal court.

Respondents' argument that preclusion effect should not be given to "adequate" arbitration proceedings in subsequent civil rights suits appears to thwart the very policy espoused by Congress that *states* should be primarily responsible and actively encouraged to protect the civil rights of their citizens. § 1738 evidences the minimal

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[4]Civil Rights Act of 1964, § 706(k) as amended, 42 U. S. C. § 2000e-5(k).

amount of deference awarded state and territorial statutes and judicial proceedings.

Congress has already acknowledged that the federal judicial system cannot cope with the jurisdictional ingenuity of claimants and counsel in enacting § 1997e which adopted a limited exhaustion requirement in order to cope with the volume of certain § 1983 claims of adult prisoners.[5]

D.

The Sixth Circuit decision in Becton v. Detroit Terminals of Consolidated Freightways, is not in conflict with its holding in this case.

The opinion of the Sixth Circuit in this case is not in conflict with its decision in *Becton v. Detroit Terminals of Consolidated Freightways*, 687 F. 2d 140 (6th Cir., 1982) (*cert. den.*) — U. S. —, 103 S. Ct. 1432 (1983).

Becton dealt with a § 1981 employment discrimination claim. Prior to suit, Becton filed his grievance complaining he was not fired for just cause. He did not raise a discrimination claim before the grievance committee. The committee found Becton had been discharged for "just cause" in an *unwritten decision*. Subsequently, Becton brought suit against the company and the union alleging racial discrimination and a retaliatory firing. The district court concluded from its reading of *Gardner-Denver* that the practice of excepting statutory discrimination claims from the general rule of finality of judgments should be narrowly circumscribed.

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[5] 42 U. S. C. § 1997e.

The Sixth Circuit disagreed, saying, "The court should defer to the arbitrator's construction of the contract." However, in Title VII or § 1983 actions, where it is difficult to sever the discharge from the claim of discrimination, a court is not conclusively bound by the arbitration panel's decision but may reconsider evidence rejected by the arbitrator in previous proceedings.

There may be some question that the reference to § 1983 may have been a typographical error. Note that the footnote to the statement: "In our view, *Gardner-Denver* should not be read as a restriction on the extent to which a Title VII or § 1983 claimant is entitled to develop his evidence of discrimination", says as follows:

> "3. Although *Gardner-Denver* was under Title VII of the Civil Rights Act, the court noted that § *1981* (sic) affords similar protection." 415 U. S. at 47, n. 7; 94 S. Ct. at 1019, n. 7. (Emphasis supplied.)

II.

As a matter of public policy, federal courts should not relitigate issues once determined in arbitration proceedings which provide due process.

A.

Michigan provides opportunity for judicial review of all common law and statutory arbitration proceedings.

The philosophy behind the judicial role in reviewing arbitration awards was stated by our Supreme Court in *Grand Rapids v. F. O. P.*, 415 Mich. 628, 330 N. W. 2d 52 (1980):

> **"The preference for arbitration in Michigan in federal labor law is triggered only if the parties agree to arbitrate. That preference does not operate to over-**

> ride the intent of the parties. The law does not require the employer, the union, or the employee members to forego judicial resolution of disputes concerning the meaning of a collective-bargaining agreement. They may choose to submit disputes to an arbitrator in preference to a judge and, if they agree to that, the law enforces their stated or agreed-upon preference. It is by enforcing the agreement of the parties in lieu of adjudication that the law 'prefers' arbitration." *id.* at 635.

Stowe v. Mutual Home Builders Corp., 252 Mich. 492, 233 N. W. 391 (1930), established that parties to common law arbitration have the right to bring an action in circuit court either to confirm or to vacate the arbitration award.

Typical of this type of review is the factual situation found in *Felters Company v. Local 318*, 108 Mich. App. 333, 310 N. W. 2d 233 (1981). In that case, the grievant protested her discharge by filing a grievance which went to arbitration. The arbitrator found that she had been improperly discharged. The company went to circuit court to vacate the award alleging the arbitrator had exceeded his authority.

The circuit court agreed and remanded the cause to the arbitrator for a decision consistent with the collective bargaining agreement. On remand, the arbitrator decided to overrule the circuit court, holding the circuit court did not have general jurisdiction, absent fraud, because the parties bargained for arbitration and not for judicial review to determine the rights and merits of the contractual relationship. The arbitrator affirmed the award as initially rendered. The company went back to circuit court and moved to have the award vacated. They also asked

for an order of superintending control over the arbitration proceedings. The circuit court vacated the arbitration award ordering that the grievant not be reinstated. The union appealed the decision.

Appeal was taken directly from the decision of the circuit court to the court of appeals by right.

On review, the Michigan Court of Appeals adopted this Court's standard of review in the *Steelworkers' Trilogy* saying:

> "Questions concerning the scope of judicial review of arbitrability in the awards made by arbitrators in labor disputes have been almost a plague on both state and federal courts for years, but the eminently proper attitude that we have taken is one of 'hands off'. The party that ends up holding the short end of the arbitrator's award may try desperately to fit the facts within the narrow doorway to the courts, but the judicial policy is clear. In the *Steelworkers' Trilogy*, the United States Supreme Court held that the merits of either the grievants or the arbitration award are irrelevant when a federal court is asked to enforce an arbitration agreement or award thereunder. Judicial review is limited to whether the award 'draws its essence' from the contract and whether the award was within the authority conferred upon the arbitrator by the collective bargaining agreement. Once substantive arbitrability is determined (as it was in the court below), judicial review effectively ceases. The fact that the arbitrator's interpretation of a contract is wrong is irrelevant." *Ferndale Education Assn. v. School District for City of Ferndale, No. 1*, 67 Mich. App. 637, 642-643, 242 N. W. 2d 478 (1976).

The cite to *Ferndale*, by the *Felters* court, on the scope of judicial review of common law arbitration, omitted, however, to include a subsequent paragraph acknowledging

that there are exceptions to the rule of judicial deference once arbitrability has been established.

These exceptions, first noted by Justice Souris in his dissenting opinion, concurred in by two other judges of the Supreme Court, in *Frazier v. Ford Motor Company*, 364 Mich. 648, 655, 657, 112 N. W. 2d 80 (1960), included:

"(1) fraud on the part of the arbitrator;

(2) fraud or misconduct of the parties affecting the result;

(3) gross unfairness in the conduct of the proceeding;

(4) want of jurisdiction in the arbitrator;

(5) violation of public policy;

(6) want of entirety in the award." *Id.* at 655.

These exceptions were noted later with approval in *E. E. Tripp Excavating Contractors v. Jackson County*, 60 Mich. App. 221, 230 N. W. 2d 556 (1975), and most recently in *Detroit Automobile Inter-Insurance Exchange v. Gavin and Detroit Automobile Inter-Insurance Exchange v. Standfest*, 416 Mich. 407, 442 N. W. 2d 418 (1982).

Our Michigan Supreme Court said in the *DAIIE* cases:

> "We thing it is safe to conclude from this look at the past, as did the dissenters in *Frazier v. Ford Motor Company*, 364 Mich. 648, 655, 657, 112 N. W. 2d 80 (1961), that at common law the ground upon which the courts may vacate an arbitrator's award at least include (1) fraud on the part of the arbitrator or the party; (2) gross unfairness in the conduct of the proceedings; (3) lack of jurisdiction in the arbitrator; (4) violation of public policy." *Id.* at 441.

Judge Souris also addressed the question of the fairness of the hearing. He allowed that judicial formality in the conduct of the hearings or other procedures recognized as essential in judicial proceedings are not required in arbitration hearings. However, where the contract provides for specific procedures in the collective bargaining agreement which provide for arbitration, the intention of the parties should be followed.

The parties, by agreement, may also decide to voluntarily arbitrate their dispute under statutes providing a procedural scheme for the process.

> "VOLUNTARY ARBITRATION; VALIDITY.
>
> [] Sec. 9d.
>
> (1) Any labor dispute, other than a representation question, may lawfully be submitted to voluntary arbitration in the manner provided in this section. [However,] arbitration of labor disputes without complying with this section shall be valid if it has heretofore been under the common law." M. S. A. § 17.454 (10.3); M. C. L. § 423.9(d).

The statute further provides "[an] *agreement* to arbitrate an existing or future dispute shall be enforceable in equity by any circuit court having jurisdiction", and that any award rendered in this proceeding shall be enforceable at law or in equity as the agreement of the parties. (Emphasis added.) M. S. A. § 17.454(10.3); M. C. L. § 423.9(d).

Since Michigan courts have ruled that statutory and common law arbitration are co-existent in this state, an agreement for statutory arbitration may be created when the parties "agree that a judgment of any circuit court

shall be rendered upon the award made pursuant to such submission". *Frolich v. Walbridge-Aldinger Company*, 236 Mich. 425, 210 N. W. 2d 488 (1926); M.C.L. § 600.5001; M. S. A. § 27A.5001.

Such an agreement calls into play G. C. R. 1963, 769.1.[6] *E. E. Tripp Excavating Contractors v. Jackson County, supra*, at 236.

This court rule also provides a procedural scheme for review of arbitration awards in the circuit court.

We would point out that in this case, the submission to arbitration made by the staff representative of the Steelworkers' Union on behalf of the petitioner, Gary McDonald, contains the following language:

> "We agree that we will abide by and perform any award rendered hereunder and that a judgment may be entered upon the award." (J.A. 29)

In *Chippewa Valley Schools v. Hill*, 62 Mich. App. 116, 233 N. W. 2d 208 (1975), this procedure was adopted even though no mention was made in the case that the parties intended entry of judgment on the award.

In *Chippewa*, the parties were signatories to a written collective bargaining agreement covering the terms and conditions of the teachers employed at the plaintiff school. That agreement contained a five-step grievance procedure for resolution of any "claim by a teacher or the association that there has been a violation, misin-

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[6]Honigman & Hawkins, Michigan Court Rules Annotated, § 769.1.

terpretation, or misapplication of the agreement, or any rule, order or regulation of the board". *id.* at 117-118.

In 1973, Mrs. Hill filed a grievance pursuant to the collective bargaining agreement. After all the steps of the grievance procedure were exhausted, the issue went to binding arbitration. The parties were represented by counsel and fully participated in the proceedings. The arbitrator issued a 13-page opinion and award sustaining the grievance of Mrs. Hill.

Plaintiffs filed for vacation of the award pursuant to G. C. R. 1963, 769.9 (1) (c); and the defendants filed for confirmation pursuant to G. C. R. 1963, 769.8. After a hearing on both motions, the circuit court entered the order confirming the award of the arbitrator. In reliance on *Stowe v. Mutual Home Builders Corp., supra,* the Michigan Court of Appeals entertained jurisdiction on a factual situation identical to this one for vacation or confirmation of an award.

Michigan courts may defer to arbitration awards when there is concurrent statutory and common law jurisdiction over the arbitration. *Detroit Police Officers Association v. The City of Detroit,* 144 Mich. App. 275, 318 N. W. 2d 650 (1982).

In this important case, an action was commenced by the Detroit Police Officers Association to enforce an arbitrator's award for back pay. The plaintiff appealed the award as of right from a grant of summary judgment in favor of the defendant in district court. A conflict then arose because of a dispute between two bargaining units, the Detroit Police Officers Association and the Detroit Police Lieutenants and Sargeants Association, over a job reclassification and back pay.

The jurisdiction of the Michigan Employees Relations Commission[7] was invoked because the police officers are public employees and entitled under the Public Employees Relations Act[8] to have their disputes resolved before this administrative tribunal.

It had been previously held in *Detroit Fire Fighters Association v. Detroit*, 408 Mich. 663, 293 N. W. 2d 278 (1980), that once the jurisdiction of MERC is invoked, that the administrative tribunal must take jurisdiction and may not defer to the arbitral proceedings under the collective bargaining agreement. However, in *Detroit Police Officers Association*, the Michigan Court of Appeals held that even though MERC had jurisdiction of the representation issue and its decision takes precedence over the decisions on representation over both arbitration panels, the arbitration award may stand, neither party raised the back-pay issue before MERC. The court argued that forcing the parties to return to MERC on the back-pay issue or rearbitrate the issue would only add to the "convoluted procedural history of the case". Thus, the judgment of the trial court was reversed and the matter remanded for entry of the summary judgment enforcing the arbitration award in favor of the plaintiff.[9]

It is argued by the petitioner that *Detroit Fire Fighters Association* stands for the proposition that

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[7]The Michigan Employment Relations Commission (hereinafter "MERC").

[8]PERA 1947, P. A. 336, as amended by 1965, P. A. 379; M. C. L. 423.201, *et seq.*, M. S. A. 17.455(1), *et seq.*

[9]It is important to note in this case that the petitioner, McDonald, although a police officer and entitled to his administrative remedy under the Public Employees Relations Act as administered by MERC, never sought this remedy. It is acknowledged that in 1976, before the Supreme Court's decision in *Detroit Fire Fighters Association v. Detroit*, MERC did exercise prearbitral deferral.

Michigan's public policy does not favor public sector grievance arbitration. We do not agree with this position and rely instead on the more recent case of *Police Officers Association v. The City of Detroit, supra,* and the compulsory arbitration statute applicable to public police, fire department and emergency medical personnel. M. C. L. § 423.231 *et seq.;* M. S. A. § 17.455(31) *et seq.*

We would also like to point out that the *Detroit Fire Fighters Association* case was a four to three opinion by the Michigan Supreme Court, with a strong dissenting argument for reversal by Justice Williams on the issue of "pre-arbitral" deferral. Justice Williams was joined in his opinion by Justice Levin who wrote the opinion in *Kaleva-Norman-Dickson School District No. 6 v. Kaleva-Norman-Dickson School Teachers' Association,* 393 Mich. 583, 227 N. W. 2d 500 (1975), as well as Justice Kavanaugh. Justice Williams strongly argued that Michigan should have been controlled by the abundant decisions of the NLRB and the United States Supreme Court, as well as the United States Circuit Courts of Appeals which have addressed the pre-arbitral deferral issue. Since § 16 of the Public Employees Relations Act is virtually identical in language as to § 10, subds. (b), (c), and (e) of the NLRB from which the doctrine of pre-arbitral deferral arises, the court should have looked for appropriate guidance to the federal precedents. *id.* at 698.

Michigan courts, as well as the Sixth Circuit, apply res judicata to unappealed arbitration awards and administrative determinations. If not taken timely, they become final and by reason of the doctrines of res judicata and collateral estoppel, are not subject to collateral attack. *Badon v. General Motors Corp.,* 679 F. 2d 93

(1982); *Roman Cleanser Company v. Murphy,* 386 Mich. 698, 194 N. W. 2d 704 (1972).

B.

Michigan provides public employees with concurrent statutory remedies.

The Public Employees Relations Act is commonly referred to as "PERA".

The petitioner, McDonald, was a public employee and, as such, was entitled to process his grievance through the Michigan Employment Relations Commission.

In many respects, PERA is patterned after the National Labor Relations Act, and its decisions are often fashioned after decisions of the NLRB. *Detroit Fire Fighters Association v. Detroit, supra.*

Arbitration of disputes is appropriate for contracts entered into under PERA. *Kavela-Norman-Dickson School District No. 6 v. Kavela-Norman-Dickson School Teachers' Assn., supra.*

The significant differences between the federal act and PERA are that: (1) PERA prohibits strikes by public employees, M. C. L. 423.202, M. S. A. 17.455(2); and (2) procedures which relate to a statutorily unfair labor charge must be conducted pursuant to Chapter 4 of the Michigan Administrative Procedures Act, M. C. L. 423.216 (a); M. S. A. 17.455(16)(a); and (3) the requirement that MERC make findings of fact in the process of resolving the unfair practices complaint, which decision is reviewable as a matter of right in the court of appeals under the competent material and substantial evidence stand-

ard. M. C. L. 423.216(d), 423.216(e); M. S. A. 17.455(16) (d), 17.455(16) (e). If the petitioner McDonald, had chosen to pursue this statutory remedy, his complaint would have been resolved by the commission in accordance with administration process.

It should be noted, however, that while PERA creates certain rights and duties, it does not make provision for access to the courts for enforcement in the first instance. Our supreme court has held on numerous occasions that MERC is the *primary* form for the resolution of labor problems experienced by public employers and employees. *Rockwell v. Crestwood School District Board of Education*, 393 Mich. 616, 227 N. W. 2d 736 (1975). Also clear is the proposition that unless unusual circumstances are present, the failure to exhaust available administrative remedies provided by PERA precludes one from successfully invoking the jurisdiction of the courts for relief. The court's policy of abstention is premised upon the assumption of the availability of the adequate administrative remedy. *United Skilled Maintenance Trades Employees of the Board of Education of Pontiac v. Pontiac Board of Education*, 375 Mich. 573, 134 N. W. 2d 736 (1965). 1977 P. A. 266 limits the issues on review to whether or not the MERC order is supported by competent, material or substantial evidence of record. The review of MERC's decisions and orders in the court of appeals is on the record made before the commission. If the commission's findings of fact, as reflected by a proper record, are supported by competent, material and substantial evidence, they are inclusive and the court of appeals is bound thereby. M. C. L. 423.216(d); M. S. A.

17.455(16) (d); *Lake Michigan Federation of Teachers v. Lake Michigan College*, 60 Mich. App. 747, 231 N. W. 2d 538 (1975).

In spite of the statutory remedy, Justice Ryan made it very clear in *Detroit Fire Fighters Association* that:

> "Finally, in our analysis, it is emphasized that we find no legislative intent forbidding or discouraging voluntary private arbitration of public employee grievance disputes. Rather, we read PERA and related state statutes as manifesting a clear legislative intent that, once a party to a public sector employment collective bargaining relationship invokes MERC's jurisdiction under PERA, that party's complaint should be resolved by MERC in accordance with the statutory processes." *Id.* at 685.

Indeed:

> "'An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the *arbitration clause* is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage.' (Emphasis Supplied.) Absent an '*express provision* excluding [a] particular grievance from arbitration' or the '*most forceful evidence* of a purpose to exclude the claim', (emphasis supplied) the matter should go to arbitration. *KND School District*, 393 Mich. at 592." *Grand Rapids v. Lodge 97, F. O. P.*, 96 Mich. App. 226, 292 N. W. 2d 529 (1980).

C.

Michigan makes special provision for grievants seeking redress for discrimination in employment.

Our courts have stressed since *Pompey v. General Motors Corp.*, 24 Mich. App. 60, 179 N. W. 2d 697 (1970), the independence in scope, purpose and source of statu-

tory, civil and contractual remedies for alleged discrimination in private employment.[10]

In *Washington* the court of appeals followed this court's dictates in *Johnson v. Railway Express Agency, Inc., supra,* and *Alexander,* stressing the independence of the contractual, statutory and constitutional rights in discriminatory employment practices. This case, however, does not fall within the purview of the Civil Rights Commission or the Michigan State Fair Employment Practices Act, M. C. L. 423.301, *et seq.;* M. S. A. 17.455(1), *et seq.*

III.

Arbitration, when selected for final resolution of a labor grievance, should not be excepted from the doctrine of preclusion.

In *Allen,* Justice Stewart proposed that the only conceivable reason for finding a universal right to litigate in the federal courts is the general distrust of the capacity of the state courts to " . . . render correct decisions on constitutional issues". *id.* at 420.

Michigan has evidenced its willingness and ability to protect its citizens' federal rights. Binding effect should not be denied arbitration awards when state courts would not do so.

Only two basic questions arise in this case. The first is whether McDonald's grievance came within the parameters of the collective bargaining agreement.

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[10]*Civil Rights Commission ex rel. Boyd v. Chrysler Corporation,* 64 Mich. App. 393, 235 N. W. 2d 791 (1975); *Civil Rights Commission v. Clark,* 390 Mich. 717, 212 N. W. 2d 912 (1973); *Chrysler Corporation v. Michigan Civil Rights Commission,* 68 Mich. App. 283, 242 N. W. 2d 556 (1976); *Washington v. Chrysler Corporation,* 68 Mich. App. 374, 242 N. W. 2d 781 (1976).

Respondents argue that it did, asserting that the charge that McDonald was fired for his union activities is an unfair labor practice, both under the FELA and PERA.[11] The decisions previously cited make it eminently clear that Michigan encourages both common law and statutory arbitration remedies for resolving these grievances.

The second question is did McDonald have a full and fair opportunity to litigate all his claims in a state court system capable of protecting the civil rights of its citizens.

The Sixth Circuit Court of Appeals found no abuse of process.

It is also clear that in Michigan, unappealed arbitration awards are final. McDonald knew he had a right to appeal and chose not to. The award became final and subject to entry of judgment in the circuit court in accordance with the agreement of the parties as evidenced in the submission to arbitration. *Badon v. General Motors Corp., supra; Roman Cleanser Company v. Murphy, supra.*

Petitioner attacks the arbitration process as an inappropriate forum to provide for the protection of constitutional rights. This argument ignores the contractual aspects of the collective bargaining agreement which, by its very nature, is negotiated by the parties at arms' length admittedly subjugating some rights for the collective good.

In *Frazier,* the Michigan Supreme Court acknowledged the contractual nature of the bargaining agreement between the union and the company which binds the union

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[11]29 U. S. C. § 158; M. C. L. § 426.16; M. S. A. § 17.454(17).

member. Judge Kelly pointed out that constitutional limitations, such as due process, which the plaintiff in *Frazier* claimed was applicable to the arbitration proceedings, is without merit, due process being applicable only to government acts and not to private relationships.

Since *Frazier,* however, proponents of the arbitration models have agreed that minimal due process is required.

Petitioner's whole argument is premised on the concept that the holding in *Alexander* ought to be applied to § 1983 cases. *Alexander* is distinguishable in that that case talks about an individual right which Congress has decreed shall be vindicated only in a federal court. By the same token, this Court's holding in *Barrentine* makes clear that actions under the Fair Labor Standards Act arises out of the statute designed to provide minimum substantive guarantees to individual workers. The *Barrentine* court made it very clear that " . . . courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement . . ." *id.* at 737

This Court made it clear in *Allen v. McCurry* that federal courts may no longer look at vaguely supported general principles when a litigant enters a federal forum. They must, instead, look at the congressional intent to determine whether or not the claimant is entitled to a *de novo* trial after the state tribunal has adjudicated a claim or applied the doctrine of res judicata or collateral estoppel.

Since the preclusion doctrine is the tool which the federal courts may use to test the state court's willingness to protect the rights of its citizens, impliedly re-

pealing § 1738 in § 1983 cases should only be considered when there is a clearly expressed legislative intent to permit relitigation.

Labor arbitration enjoys a special status in the framework of the national labor policy. Extending the holding in *Alexander* strips the arbitral process of the unstructured flexibility which now characterizes private dispute resolution. Nothing is to be gained by depriving the parties of their desire to tailor their arbitration procedure to fit their own desires so long as there is a minimum level of procedural integrity maintained by the state through judicial review.

The risk that individual interest will become subordinate to the collective interests of the group is one of the risks which the union employee agrees to take when he joins the union. This risk becomes unacceptable only when the state fails or refuses to provide adequate review of the arbitrability of the issue or does not provide separate statutory and judicial remedies for individual constitutional or federally mandated statutory rights. *Vaca v. Sipes*, 386 U. S. 171 (1967); *Breish v. Ring Screw Works*, 397 Mich. 586, 248 N. W. 2d 526 (1975). However, no claim of unfair representation was made in this case until McDonald instituted his § 1983 case.

Less than one year ago, this Court commented on the importance of the application of the traditional preclusion concept to § 1983 actions. It stated:

> "[t]he federal courts consistently have applied res judicata and collateral estoppel to causes of action in issues decided by state courts. *Allen v. McCurry*, 449 U. S. 90, 96, 101 S. Ct. 411, 416, 66 L. Ed. 2d 308 (1980); *Montana v. United States*, 440 U. S. 147, 99

S. Ct. 970, 59 L. Ed. 2d 210 (1979); *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 92 L. Ed. 832 (1946). Indeed from *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195 (1877); to *Federated Department Stores, Inc. v. Moitie*, 452 U. S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts have been established, the conclusive resolution of disputes within the jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been made in that action. *Allen v. McCurry*, 449 U. S. at 94, 101 S. Ct. at 14; *Cromwell v. County of Sac*, 94 U. S. at 352. Under collateral estoppel, once the court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *Montana v. United States*, 440 U. S. 147, 158, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210. *Parklane Hosiery v. Shore*, 439 U. S. 322, 326, n. 5, 99 S. Ct. 645, 649, n. 5 (1979). Thus, invocation of res judicata and collateral estoppel 'relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'' *Allen v. McCurry*, 449 U. S. at 94, 101 S. Ct. at 414.

When a state court has adjudicated a claim or issue, these doctrines also serve to "promote the comity between state and federal courts that has been recognized as the bulwark of the federal system". *Kremer v. Chemical Construction Corp.*, 456 U. S. 461, 102 S. Ct. at 1889-90, n. 6.

Petitioner presents no convincing evidence of why an exception to the traditional preclusion doctrine should be made in this case other than to make a federal forum avail-

able to him for relitigation of his grievance. A federal forum was available to him in the first instance and he chose a different forum. Simply because he received an unsatisfactory result, he should not be allowed to relitigate his claim in a federal court. He bargained for resolution of his grievances within the format of the collective bargaining agreement. Having received the benefits of this bargain, he should abide by his contractual obligation to honor the decision of the arbitrator. *Smith v. Dawes,* 614 F. 2d 1069 (5th Cir. 1980).

Public policy arguments mitigate against stretching *Alexander* to apply to § 1983 cases. It was reported in *Patsy v. Board of Regents,* 102 S. Ct. 2557, 2577 (1982), that in 1981 alone, over 30,000 civil rights actions were filed in federal district courts. Creating a right of *de novo* review in federal court in § 1983 cases will not serve to increase the quality of justice. Our federal courts are so overwhelmed that without the important policies of finality and repose, the federal court system will become a dream rather than a reality.

Indeed, withholding preclusion in this case will achieve the exact opposite result intended by Congress in enacting § 1983. It will encourage labor unions and state courts to abrogate their responsibilities rather than encourage more efficient and acceptable dispute resolution.

Private labor arbitration has been a successful development of private self-government. It respects the individual right to resolve grievances in a forum comfortable to employers and employees. It is still relatively inexpensive as compared to civil remedies. It responds faster to the areas of contention. It promotes the national goals of peace in the work place.

Without continued support, unions, management and arbitrators will lose the freedom to operate without judicial intrusion.

CONCLUSION

For these reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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No. 83-219

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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No. 83-219

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ADDITIONAL STATEMENT OF THE CASE

Respondents assert that McDonald's "claim in federal court was not that his constitutional right to free speech was violated by his discharge, but that he was fired for

'union activities' " (Brief for Respondents at 2), and Amicus EEAC asserts that McDonald's particular First Amendment activities are somehow less worthy of protection under Section 1983 because they involved "union activity."[1] These assertions require an additional statement of the facts to spell out the events which led to McDonald's discharge. Those facts demonstrate that Chief Longstreet fired McDonald principally to retaliate for McDonald's attempts to inform city officials of citizen complaints about sexual assaults by the Chief.

Prior to his discharge, McDonald and the other two officers in the force had received citizen complaints from a number of women claiming that Chief Longstreet was engaged in sexual misconduct or assaults. (Tr. 132-138, 287-288, 291-296). Uncertain as to the appropriate course of action, McDonald and the other officers contacted the city attorney who advised them to notify a city councilman of the complaints. (Tr. 138, 296). They then had several meetings with Councilman Arnold Dunbar during which they presented information about the complaints. (Tr. 138-139, 298-299, 388-391). As a result of these disclosures, the City Council requested an investigation by the Michigan State Police. (Tr. 393).

After the state police investigation began, Chief Longstreet told McDonald that "he would have [his] job for starting the investigation." (Tr. 150-151). The Chief threatened all three officers and blamed them for the investigation. (Tr. 316). On November 22, three days before McDonald's discharge, the officers met with the city

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1. These assertions are surprising since Respondents have repeatedly acknowledged that McDonald's suit alleged that he was fired in retaliation for exercise of his First Amendment rights to freedom of speech and association. (See pages 4-6 below.)

manager to ask that he take steps to stop the Chief's harassing and threatening them because of the investigation. (Tr. 151, 315-317, 496-497, 558-559). McDonald was their spokesman. (Tr. 151). The city manager refused to take any action. (Tr. 151, 316, 559).

The next day, McDonald arranged a meeting with the Mayor to discuss the threats and harassment. (Tr. 151-152, 317-318). One of the complaining women (Collette Morgan), McDonald, the other officers and Ms. Morgan's fiance met at the agreed time, but the Mayor did not appear. (Tr. 152, 317-318). Chief Longstreet did. He told McDonald that he had gone too far and again said he would "have his job." (Tr. 318, 154-155). He threatened Ms. Morgan. (Tr. 154-155). He threatened one of the other officers. (Tr. 155). He told McDonald that if he "didn't have anything better to do than to dig up dirt about him" he should leave. (Tr. 154-155).

Chief Longstreet has acknowledged that he knew that Ms. Morgan was "one of the young ladies I was accused of having supposedly immoral conduct with." (P. Ex. 34 at pp. 91-93 (Testimony of Chief Longstreet); Tr. 764-765). He was aware that she and the officers were there to provide information to the Mayor about her charges against him. (P. Ex. 34 at pp. 91-93 (Testimony of Chief Longstreet); Tr. 764-765).

The next day, the Chief and City Manager advised the City Council that McDonald would be fired, and he was fired the following afternoon. (Tr. 518, 698, 155; P. Ex. 8, J.A. 24, Tr. 156). Respondents acknowledge that McDonald's efforts to bring the citizens' complaints to the attention of city officials were among the reasons for his discharge. (P. Ex. 9 at ¶¶7-8, J.A. 27, Tr. 160; P. Ex. 34 at pp. 87-90, 91-94 (Testimony of Chief Longstreet)).

Thus, the record establishes a pattern of retaliation against McDonald for his efforts to bring to light complaints by members of the public that Chief Longstreet was engaged in sexual misconduct. Although in a loose sense these efforts can be called "union activities", they were not made on behalf of the Union or in McDonald's capacity as a member of the Union. Discharge for this type of First Amendment activity does not appear to be covered by the "No Discrimination Because of Union Activities" clause of the Collective Bargaining Agreement. (P. Ex. 42, §1.2, J.A. 460). That clause provides:

> "The City agrees that it will not discriminate against, interfere with, coerce or restrain employees in any way *because of their membership in, or their activity in behalf of, the Union* unless such activity is specifically prohibited by this Agreement." (emphasis added).

Thus, while it prohibits retaliation for "activity in behalf of the Union", it does not prohibit retaliation for First Amendment activity on behalf of non-employee citizens.

Respondents' assertion that McDonald's "claim in federal court was not that his constitutional right to free speech was violated by his discharge, but that he was fired for 'union activities,' " (Brief for Respondents at 2) is entirely inconsistent with the history of the case and with Respondents' previous position. Throughout the proceedings in federal court, McDonald asserted that his discharge violated his First Amendment rights and Respondents have consistently acknowledged the existence of his First Amendment claims. McDonald's complaint alleged that he was deprived of his job "for exercising his fundamental rights of freedom of speech, freedom of as-

sociation and freedom to petition for redress of grievances . . . ."[2] (Complaint ¶10, J.A. at 5). Respondents clearly understood the nature of that allegation since their answer expressly denied "the allegation that plaintiff has been deprived of his position for exercising his fundamental rights of freedom of speech, association and petition." (Answer ¶10, J.A. at 15). At the close of the trial—and without objection by Respondents—the jury was instructed that McDonald could prevail on his First Amendment claim only if he proved "that the defendants' acts or conduct deprived the plaintiff of his rights to freedom of speech or association as guaranteed by the First Amendment to the Constitution of the United States." (DTr. 219-220).[3]

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2. McDonald also alleged and introduced evidence that he had engaged in traditional union activities such as processing grievances and organizing employees and that these activities contributed to his discharge. (Complaint ¶11b, J.A. 5).

3. That instruction provided:

> "In order to prove his first claim that he was discharged for exercising his First Amendment rights to freedom of speech and association, the burden is upon the plaintiff to establish the following facts by a preponderance of the evidence:
>
> First that the defendants knowingly discharged the plaintiff without cause;
>
> Second, that in doing so, the defendants acted under color of state or local law;
>
> Third, that the defendants' acts or conduct deprived the plaintiff of his rights to freedom of speech or association as guaranteed by the First Amendment to the Constitution of the United States; and
>
> Fourth, that the defendants' acts or conduct were the proximate cause of injury and consequent damage to the plaintiff." (DTr. 219-220).

Similarly, without objection by Respondents, the jury was instructed that:

> "As it pertains to civil rights cases such as this one, the First Amendment of the Constitution of the United States guarantees the right of the people to peaceably as-

(Continued on following page)

Respondents' recognition of the First Amendment nature of McDonald's claims continued throughout the appellate process. Most recently, in their Brief in Opposition to Certiorari, Respondents unequivocally acknowledged:

> "In his federal suit, he complained that his discharge as a police officer was in *retaliation for expressing his First Amendment rights to freedom of speech and assembly* as well as a claim that the discharge procedure denied him due process under the Fourteenth Amendment." Op. Cert. at p. 7 (emphasis added).

Respondents made an almost identical admission in their answer brief in the Court of Appeals. (Ct. App. Ans. Brief at p. 3). At no point did Respondents suggest to the Court of Appeals that McDonald was alleging retaliation for something other than protected First Amendment activity or that his activities were entitled to a lower level of protection than other constitutionally protected rights.[4]

Footnote continued—

semble and to petition the government for a redress of grievances. In addition it protects the right to speak one's opinions, the right to engage in political activities, and the right to support the political candidates of one's choice." (DTr. 222).

4. In their brief in the Court of Appeals, Respondents attacked the decision in favor of McDonald on only three grounds: (1) that the decision was barred by *res judicata*, (2) that there was insufficient evidence of damage, and (3) that attorneys' fees should not have been awarded against them. (Ct. App. Ans. Brief at pp. ii-iii, 32-49). At no point did Respondents suggest that there was inadequate evidence of protected First Amendment activity. Nor did they claim that McDonald's First Amendment activity was entitled to a lower level of protection because it involved "union activities."

ARGUMENT

I

The Reasons for Denying Preclusive Effect to Arbitration Are Fully Applicable to §1983 Cases in General and to This Case in Particular

The efforts of Respondents and amicus EEAC to distinguish suits under §1983 from ones under Title VII or the Fair Labor Standards Act are unfounded. As discussed in Parts II-IV of our previous brief, the three independent reasons for denying preclusive effect to arbitration awards under Title VII and the FLSA are fully applicable to §1983. First Amendment rights protected under §1983 are distinctly individual rights and this Court has consistently held that waiver of those rights may not be made a condition of public employment. Second, in enacting §1983, the 42nd Congress intended to create a broad judicial remedy for violations of Constitutional rights and gave no indication that it intended arbitration to bar resort to that remedy. Finally, the collectively bargained arbitration forum is not as well suited as state and federal courts to provide full protection to Constitutional rights.

Neither Respondents nor amicus dispute that these propositions are true as to most §1983 cases. Instead, they apparently argue that a special rule should be applied to this case because they believe that McDonald's particular First Amendment activities were ones in which the union can be presumed to have a vital interest. That argument fails for two reasons. First, McDonald was fired to retaliate for his efforts to notify public officials of citizen complaints that Chief Longstreet was involved in sexual misconduct toward women in the community.

These efforts are not the sort of activity which a union has a vital organizational interest in protecting. Therefore, the argument simply does not apply to this case. Second, even in cases in which a union could be presumed to fully share the employee's interest, that fact would be insufficient to justify giving preclusive effect to the arbitration.

Respondents and amicus make the unwarranted assumption that McDonald's First Amendment activities were necessarily of great interest to the Steelworkers Union. However, Chief Longstreet fired McDonald as part of a pattern of retaliation for McDonald's efforts to inform city officials of complaints against the Chief. These were not complaints by employees about wages or working conditions but rather complaints by *non-employee citizens* that the Chief was engaged in sexual misconduct or assaults against women in the community.[5] See Additional Statement of the Case, above.

Unlike disputes over a firing for more traditional "union activities," such a dispute is not necessarily of great importance to a union. Public-sector unions are not always concerned about how government officials treat non-employee citizens any more than private-sector unions are always concerned about how employers treat their non-employee customers. Neither public-sector nor

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5. Amicus's suggestion that McDonald's First Amendment claim is one within a labor arbitrator's special competence appears to be based on the same incorrect assumption, i.e. that McDonald alleged a firing in retaliation for traditional union activities regarding disputes over wages or working conditions. There is no reason to believe that labor arbitrators have any more specialized competence in determining the First Amendment issues involved in this case than in determining the racial discrimination issues involved in *Alexander*. There is substantial reason to believe that they have *less* competence in First Amendment issues than they have in the wage and hour issues involved in *Barrentine*.

private-sector unions necessarily want their members to reveal damaging information about management's treatment of the public. Either may want to withhold that information for any number of reasons. The union may prefer to trade non-disclosure for concessions by management at the bargaining table. It may want to avoid replacement of existing management officials with ones more hostile to the union. It may be concerned that the disclosures will have unfavorable repercussions for the union. And it may justifiably consider management's treatment of the public to be of secondary importance compared to its treatment of its employees—the only persons the union has any obligation to represent.[6]

Of course, one could hope that unions would be as concerned about violations of employees' rights to free speech as they are about their collectively bargained rights. (Similarly, in *Alexander* and *Barrentine*, one could have hoped that they would be just as concerned about employees' rights under Title VII or the FLSA). However, Congress did not leave the protection of those rights to unions but to the courts. There is ample historical justification for the fear that some unions will not fully protect the free speech rights of their members. In the private sector, Congress has recognized that unions as well as employers are sometimes guilty of "disregard of the rights of individual employees." Labor-Management Reporting and Disclosure Act of 1959 §2(b), 29 U.S.C. §401(b). Congress found it necessary to create a cause of action to protect employees against union interference

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6. Moreover, even where the interests of the employee and the union appear to correspond, the magnitude of those interests may significantly differ. The entire bargaining unit in this case had only three members. Tr. 120. The Steelworkers ceased representing the unit within a short time after McDonald was fired. DTr. 116.

with their right "to express any views, arguments or opinions." LMRDA §§101(a)(2), 102, 29 U.S.C. §§411(a)(1), 412; *see, e.g., Stachan v. Weber*, 535 F.2d 1202 (9th Cir. 1976).

Moreover, there is no justification for giving preclusive effect to arbitration decisions even if the union and the employee could be presumed to share a common interest. As this Court made clear in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 n.21 (1974), the ultimate determination of whether individual civil rights have been violated must be made in court.

> "But courts should ever be mindful that Congress, in enacting [the statute] thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."

Thus, various factors may justify giving greater or lesser evidentiary weight to the arbitrator's decision. No combination of factors justifies abdication of the judicial responsibility to make the ultimate decision.

The single factor on which amicus focuses certainly would not justify that abdication. The extent to which the union and the individual employee can be presumed to share a common interest in the outcome of arbitration may be *one* factor to be considered in determining the evidentiary weight to be given the arbitrator's decision. It is certainly not the only factor and is unlikely to be the most important one. In the present case, for example, a number of facts about the arbitration merited consideration. Consideration had to be given to the fact that McDonald had not been given notice of the charge against him, that the union had refused to call a crucial witness on his behalf, that Longstreet had failed to disclose exculpatory

evidence, and that the arbitrator was not presented and did not decide the First Amendment retaliation issue. Even in determining the *evidentiary weight* to be given the arbitration decision, these factors outweigh any presumption that the union and employee shared a common interest. Yet amicus suggests using that presumption not only to determine the weight to be given the arbitration award but also to bar the introduction of any evidence at all regarding the substantive issue—whether McDonald's constitutional rights were actually violated.

II

The Decisional Law of Michigan and of This Court Would Deny Preclusive Effect to Collectively Bargained Arbitration in Subsequent §1983 Cases. Nothing in the Restatement of Judgments Suggests a Contrary Result

Amicus EEAC argues that the Restatement (Second) of Judgments (1982) (hereinafter cited as "Restatement") would suggest that the arbitration decision in this case should be given preclusive effect. This argument fails for two reasons. First, if the Restatement did suggest that result, it would be contrary to the decisional law of Michigan and this Court. Second, the Restatement does not support giving preclusive effect to arbitration in this case.

Neither amicus nor Respondents have cited a single decision of this Court or any Michigan court holding that an adverse arbitration award should bar a subsequent action to vindicate individual statutory or constitutional rights. Our research has revealed no such case. Regardless of what amicus claims that the Restatement may say, this Court has repeatedly held that prior arbitration does not preclude such actions. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas Best*

Freight System, Inc., 450 U.S. 728 (1981).[7] Moreover, the State of Michigan has repeatedly refused to give preclusive effect to arbitration awards in subsequent actions to vindicate employees' statutory or constitutional rights. *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 64 Mich. App. 393, 235 N.W.2d 791, 797-798 (1975); *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1980); *City of Grand Rapids*, 1975 MERC Lab Op 102 (1975).

Even *state-court* judgments can be granted no greater preclusive effect by federal courts than they are granted by the courts of the state in which they were rendered. *Haring v. Prosise*, ... U.S. ....., 103 S.Ct. 2368, 2373 n.6 (1983). As discussed in Part V.B. of our previous brief, under Michigan law an adverse arbitration decision will not preclude a subsequent action to vindicate individual statutory or constitutional rights. Amicus's attempt to disregard Michigan law in favor of its own interpretation of the Restatement is an effort to create a special federal rule of preclusion. The adoption of such a rule was unanimously rejected by this Court in *Haring*.

In fact, the Restatement does not support giving preclusive effect to arbitration in this case. The Restatement contains no mechanical rule as to whether arbitration awards should or should not be given preclusive effect. Instead, under the Restatement, the issue depends on an evaluation of how the inherent limitations of the arbitration process would affect the public policies embodied by the particular substantive legal provision. This Court has "long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.' "

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7. As Justice Rehnquist has pointed out, this Court is not bound by the views expressed in the Restatement. *Montana v. United States*, 440 U.S. 147, 164 (1979) (concurring opinion).

Alexander v. Gardner-Denver Company, 415 U.S. 36, 56 (1974) (Quoting *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 359-360 (1971)). Under the Restatement, resolving the issue requires:

> "consideration [of] whether extrinsic policies indicate that the second forum should nevertheless examine the matter in question anew. These policies concern the relative competence and responsibility of the two forums. . . . [S]ubstantive concerns emanate from the fact that resolution of doubtful cases can significantly affect the social impact of a particular substantive legal provision or scheme of provisions. . . . *Whether [preclusion] ought to follow can depend on concerns of a substantive nature regarding the type of controversy involved. The nature of these concerns and the weight they should be accorded are specific to the substantive area in question and cannot be defined in a useful generalization.*" *Id.* at 265-266 (emphasis added).

In the context of arbitration, these substantive concerns are recognized in Sections 84(2) and 84(3)(b). These Sections deny preclusion if the statutory scheme of remedies permits the litigation or if preclusion would be incompatible with a public policy that the second forum should be free to make an independent determination of the issue. Thus, the Restatement suggests exactly the sort of analysis which this Court undertook in *Alexander* and *Barrentine*, and which we urged in Parts II-IV of our previous brief.[8]

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8. Michigan courts have undertaken a similar analysis. Concluding that considerations of public policy strongly militate in favor of "cumulative and overlapping remedies" in the field of civil rights, they have refused to permit arbitration to bar subsequent civil rights actions. *Michigan Civil Rights Commis-*

(Continued on following page)

To the extent that the Restatement provides any mechanical rules for this case, those rules require that preclusion be denied. McDonald would not be bound since he was not a party to the arbitration within the meaning of Section 34 of the Restatement. The Union—not McDonald—submitted the case to arbitration and agreed to be bound by the outcome. P. Ex. 31, J.A. 29, Tr. 763. The arbitrator recognized that there were only two parties to the arbitration, the City and the Union. P. Ex. 35, J.A. 30 at pp. 30, 44, Tr. 764-765. McDonald did not control what evidence was presented or arguments were made at arbitration. On the contrary, he strongly disagreed with crucial Union decisions about that presentation. Tr. 238, 240-243, 165-166, 701, DTr. 90-91. Unless a person has the rights of a party to control the presentation at arbitration, he is not bound by the outcome. Restatement, Section 83(2)(b) (Made applicable to arbitration by Restatement, Section 84(3)(b)). As the comment to Section 83(2) states:

> "For purposes of applying the rules of preclusion on the basis of an administrative determination [or arbitration award], the person must have the rights of a party or be represented by such a party. In some types of administrative proceeding [and arbitrations], the victim of a statutory wrong may complain to the agency [or union] but not be given initiative or control of an enforcement proceeding. In such circumstances, the agency [or the union] rather than the

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Footnote continued—

sion ex rel. Boyd v. Chrysler Corporation, 64 Mich. App. 393, 235 N.W.2d 791, 798 (1975); *see also Chrysler Corporation v. Michigan Civil Rights Commission*, 68 Mich. App. 283, 242 N.W.2d 556, 559 (1976); *Hernden v. Consumer Power Co.*, 72 Mich. App. 349, 249 N.W.2d 419, 421 (1976); *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278, 283 (1980); and cases discussed in Brief for Petitioner at pp. 31-36.

victim, is the party to whom the rules of res judicata apply." Restatement, Section 83, Comment c.

As Justice Rehnquist recently stated, "It is a fundamental premise of preclusion law that non-parties to a prior action are not bound by the judgment." *Ashley v. City of Jacksonville,* ..... U.S. ....., 52 U.S.L.W. 3287 (October 11, 1983) (Dissenting from denial of *certiorari*).

The Restatement would also deny preclusive effect to the arbitration because the arbitrator was not authorized to resolve McDonald's First Amendment claims or to provide the damage remedies available under Section 1983. Restatement §26. As discussed in greater detail in our original brief, the arbitrator's authority was expressly limited to interpretation and application of the collective bargaining agreement. He did not have authority to consider the First Amendment issue or to grant the full range of relief available under Section 1983. Therefore, under Section 26 of the Restatement, McDonald's claim would not be extinguished since he was "unable to rely on a certain theory of the case [and] to seek a certain remedy or form of relief" in the arbitration.[9]

III

Respondents Provide No Authority Suggesting That Michigan Courts Would Give Preclusive Effect to the Arbitration in this Case

Respondents fail to cite a single case in which any Michigan Court has ever suggested that an arbitration award under a collective bargaining agreement would bar

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9. Further reasons why the principles set forth in the Restatement would deny preclusive effect to the arbitration in this case are set forth in the *Amicus* brief of the Edwin F. Mandel Legal Aid Clinic at pages 16-20.

a subsequent suit to vindicate individual statutory or constitutional rights. In fact, Respondents acknowledge that the courts of Michigan stress that statutory and contractual remedies for violations of civil rights are independent of each other. Brief for Respondents, Part II.C. at pp. 24-25. They provide no reason to believe that a Michigan court would give preclusive effect to the arbitration decision in this case.

Respondents do suggest that Michigan public policy generally favors public-sector grievance arbitration. They argue that the Michigan Supreme Court's decision in *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1982) (cited in Part V.B. of our previous brief) has been somehow overruled by the decision of Michigan's intermediate appellate court in *Detroit Police Officers Association v. City of Detroit*, 114 Mich. App. 275, 318 N.W.2d 650 (1982). Of course, the Michigan Court of Appeals cannot overrule the state's Supreme Court. Moreover, there is simply no inconsistency between the decisions.

Police Officers involved a jurisdictional dispute between two unions over which collective bargaining agreement covered a particular classification of employee. Each union had obtained an arbitration decision that *its* contract governed the classification. The court held that, although only the Michigan Employment Relations Commission could decide which of the two contracts applied, the arbitrator could determine whether back pay was due under the applicable contract. The Court of Appeals expressly rejected the argument that its position in any way conflicted with *Fire Fighters* stating "We do not believe that [*Fire Fighters*] requires a contrary result." 318 N.W.2d at 652 n.2.

Respondents also refer to a number of Michigan statutes which they believe support their position in various ways. However, none of these statutes deal with public-sector grievance arbitration. Respondents repeatedly rely on the Michigan Labor Mediation Act, M.C.L. §423.1 *et seq.*, M.S.A. §17.454(1). However, public-sector employers are expressly excluded from the coverage of that act. M.C.L. §423.2(f); M.S.A. §17.454(2)(f). Similarly, Respondents rely on Chapter 50 of the Michigan Revised Judicature Act ("RJA") (M.C.L. §600.501 *et seq.*; M.S.A. §27A.5001 *et seq.*) and General Court Rule ("G.C.R.") 769. However, RJA Chapter 50 is expressly *inapplicable* to collective bargaining agreements (M.C.L. §600.5001(3); M.S.A. §27A.5001(3)), and G.C.R. 769 applies only to arbitrations covered by RJA Chapter 50. G.C.R. 769.1. Finally, Respondents rely on the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act ("P.A. 312"), M.C.L. §423.231 *et seq.*, M.S.A. §17.455(31) *et seq.* However, P.A. 312 deals only with "interest" (contract formation) arbitration, and has nothing to do with grievance arbitration *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278, 281-282 (1980).

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 83-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARY MCDONALD,
Petitioner,
v.
CITY OF WEST BRANCH, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, AS AMICI CURIAE SUPPORTING PETITIONER

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BRIEF FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, AS AMICI CURIAE SUPPORTING PETITIONER

This brief *amici curiae* is filed with the consent of the parties. The letters granting consent have been lodged with the Clerk.

STATEMENT OF INTEREST

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 95 national and international labor unions with a

total membership of approximately 13,500,000 working men and women. United Steelworkers of America ("USWA"), an affiliate of the AFL-CIO, is a labor organization with over 1,000,000 members employed in a diversity of fields. USWA was the bargaining agent of the police officers employed by respondent City of West Branch. In that capacity, USWA negotiated the collective bargaining agreement under which petitioner's discharge grievance was arbitrated, and USWA presented that grievance to the arbitrator.

The AFL-CIO and USWA are interested in assuring that arbitration awards under labor contracts will not preclude employees from asserting their First Amendment rights in actions brought under 42 U.S.C. § 1983.[1]

SUMMARY OF ARGUMENT

1. This Court has twice decided that labor arbitration decisions are not to be accorded so broad a preclusive effect as to deny an individual the opportunity to litigate in a federal court a claim based on that individual's federal statutory rights. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine* v. *Arkansas-Best Freight*

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[1] The caption of this case lists USWA as a respondent, and the brief in opposition, at p. 1, identifies USWA as one of the parties joining the brief in opposition. USWA did not authorize that joinder, and does not subscribe to the positions stated in that brief. USWA was named as a defendant in petitioner's complaint because petitioner alleged therein that USWA had breached its state-law duty of fair representation in presenting the grievance to the arbitrator. The district court declined to exercise pendent jurisdiction over that state law claim, and the complaint against USWA was dismissed. As petitioner did not appeal that dismissal, USWA was not a party in the court of appeals and is not properly a party here. (The caption identifies USWA as "United Steelworkers of America, District 29." There is no separate legal entity by that name. District 29 is simply an administrative office of USWA.)

Systems, 450 U.S. 728 (1981). All of the considerations that underlie the conclusion reached in *Alexander* and *Barrentine* apply equally in this case, and those precedents are therefore dispositive here.

2. The rights established through collective bargaining are collective rights, and those rights are enforceable through the grievance-arbitration process by the union as the representative of the collective—not by the individual employees involved. The union has "exclusive control over the manner and extent to which an individual grievance is presented." *Alexander*, 415 U.S. at 58, n.19. To give preclusive effect in a 42 U.S.C. § 1983 case to a labor arbitrator's decision would be to deprive the plaintiff of the opportunity to litigate his own statutory claim in his own way. Moreover, the labor arbitration system, and the role of unions in processing grievances within that system, would be grossly deformed were arbitration awards to determine not only claims arising under collective agreements, but also an individual's claim arising under federal constitutional or statutory law.

3. Numerous employees, if confronted with the rule that arbitration of their contractual grievances precluded litigation of their federal constitutional claims in the courts, would choose to bypass the contractual grievance procedure. The result would be that disputes that might otherwise have been resolved within the consensual processes established at the workplace will instead be thrust precipitously into the federal courts, to the detriment of both the labor arbitration system and the judicial system.

ARGUMENT

1. Permitting a second litigation of a legal claim or a factual dispute entails substantial social costs. In our legal system the defense that a matter has been resolved in a prior adjudication is therefore normally regarded as dispositive. See, e.g., *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466-467, n.6 (1982). For example, there is no dispute here that labor arbitration decisions are conclusive on the meaning and effect of a collective agreement. *Steelworkers* v. *Enterprise Wheel & Car Corpy.*, 363 U.S. 593 (1960). But, in certain situations granting preclusive effect to a resolution reached in an earlier proceeding entails even higher social costs; in those situations the prior adjudication defense is not honored. And, as *Kremer* recognized, 456 U.S. at 477-478, this Court has twice concluded that labor arbitration decisions are not to be accorded so broad a preclusive effect as to deny an individual the opportunity to litigate in a federal court a claim based on that individual's statutory rights. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine* v. *Arkansas-Best Freight Systems*, 450 U.S. 728 (1981). We submit that *Alexander* and *Barrentine* control this case.[2]

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[2] This case, unlike *Alexander* and *Barrentine*, involves on arbitration award rendered under a collective agreement that is not governed by federal law. But as this Court explained in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 223 (1977), "Michigan has chosen to establish for local government units a regulatory scheme which, although not identical in every respect to the NLRA or the Railway Labor Act, is broadly modeled after federal law" (footnote omitted). Under Michigan law employees of local government units enjoy the rights to self-organization and to bargain collectively, *id.* at 223; a union selected by a majority of employees in an appropriate unit becomes the exclusive representative of all the employees in that unit, *id.* at 223-224; and a union thus selected owes a duty of fair representation to all employees in the unit, *id.* at 224. Like Michigan, most states that have adopted public employee collective bargaining laws have based those laws on the central principles of the federal labor policy. That being so, the arbitration process here has the same basic qualities as the arbitration

In *Alexander*, this Court ruled that an arbitrator's decision under a collective agreement that an employee had been discharged for just cause did not preclude that employee from obtaining *de novo* consideration in federal court of his claim that the discharge had been based on racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The *Alexander* Court made it clear that in this context preclusion is inappropriate under "[w]hatever doctrinal label," expressly rejecting the doctrines of "election of remedies and waiver" and the "doctrines of *res judicata* and collateral estoppel." 415 U.S. at 49, n.10.

In *Barrentine*, the Court ruled, based on *Alexander*, that an arbitrator's decision rejecting a claim for wages under a collective agreement requiring compensation "for all time spent in [the employer's] service" (450 U.S. at 731) did not preclude the affected employees from obtaining *de novo* consideration in federal court of their claims that the failure of the employer to compensate for the time in question constituted a violation of the minimum wage provisions of the Fair Labor Standards Act.

In the instant case, the preclusion question is raised in the context of a First Amendment claim in a 42 U.S.C. § 1983 action. Here again, as in *Barrentine*, the difference in the statutory basis for the court action provides no rational ground for reaching a result different from that reached in *Alexander*. First Amendment and other rights enforceable in a § 1983 action enjoy at least the same place in the constellation of federal rights as do rights derived from Title VII or from the FLSA. "There is no suggestion in [§ 1983's] statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdic-

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processes this Court has addressed in cases under the federal labor laws. In this brief we therefore cite to such federal cases as descriptive of the basic characteristics of labor arbitration whether under federal or state labor laws.

tion." *Alexander*, 415 U.S. at 47. And, qualities peculiar to labor arbitration make that process an unsuitable one for resolving an individual's federal statutory rights. This brief is addressed to elaborating the basis for the latter point, which was a major predicate for the decisions in *Alexander* and *Barrentine*.

2. Labor arbitration is an integral part of a system for the peaceful, consensual resolution of labor disputes established by unions and employers through collective bargaining. See *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960). Labor arbitration is wholly a creature of contract, the collective agreement between the union and the employer. *Id.* at 582. In the vast majority of labor contracts, including the agreement in this case, the function of arbitration is carefully delineated: to resolve disputes arising between the union and the employer *as to the meaning or application of the contract.* By performing that function, labor arbitration facilitates the ongoing relationship between the employer and union and avoids the disruptions that result from economic warfare or from litigation in court. As this Court explained in *Warrior & Gulf*:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.
>
> > A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." Shulman, [Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999] at 1016. [363 U.S. at 581].

Experience has shown that labor arbitration is well-suited to perform its labor relations function. But that is not to say that labor arbitration is well-suited to performing the very different function of determining claims of individual employees based on federal statutory and constitutional rights that may arise in the workplace. In fact, labor arbitration is not suited to the latter function because of two characteristics, both of which are essential to realizing the labor relations objectives that have prompted employers and unions to opt for that system of dispute settlement.

a. Under most collective agreements, including the agreement in this case, *the parties to a labor arbitration are the employer and the union*, and not the particular employee or employees who have an interest in the arbitrator's decision. As a party, the union, not the individual employee(s) involved, controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case. The union has "exclusive control over the manner and extent to which an individual grievance is presented." *Alexander*, 415 U.S. at 58, n.19. See also *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). In performing these tasks, the union's objective is not solely to further the interests of the employee(s) directly involved; rather, the union's primary objective is to further the collective interests of the members of the bargaining unit. The interests of the collective often may dictate a different approach to a given arbitration case than the interests of the individual(s) involved. As this Court stated in *Barrentine*, 450 U.S. at 742:

> Since a union's objective is to maximize [the] overall [interests] of its members, not to ensure that each employee receives the best . . . deal available, *cf. Gardner-Denver*, 415 U.S., at 58, n.19, a union balancing individual and collective interests might

> validly permit some employees' . . . benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

To be sure, in exercising its representative function the union is limited by its duty fairly to represent all the members of its bargaining unit. That duty—to refrain from "conduct toward a member of the collective bargaining unit [that] is arbitrary, discriminatory, or in bad faith" (*Vaca* v. *Sipes*, 386 U.S. at 190)—creates a correlative right in the individual employees in the unit. But that duty and right do not diminish the union's ability in good faith to serve the collective good at the expense of an employee or of a group of employees. See *Barrentine*, 450 U.S. at 742 (quoted *supra*, pp. 7-8). See also *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964) ("we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another"); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339 (1953). The rights established through collective bargaining are thus collective rights, and those rights are enforceable through the grievance-arbitration process by the union as representative of the bargaining unit as a whole.

In contrast, the rights sued on in a § 1983 action derive not from a private agreement but from the Constitution or a federal statute; those rights are individual, not collective; and, the individual is free to enforce those rights directly, without the intervention of a union. *Cf. Barrentine*, 450 U.S. at 739-740. The union's duty of fair representation therefore does not extend to the representation of employees in connection with claims based on rights conferred directly on those employees as individuals by the Constitution or a federal statute. The fair representation duty is imposed on unions to compen-

sate for "extinguish[ing] the individual employee's power to order his own relations with his employer" and "vest-[ing in] unions [the] power to order the relations of employees with their employer." *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, 180-181 (1967). The extent of the duty is therefore defined by the "scope" of the union's "authority . . . as exclusive bargaining agent." *Humphrey* v. *Moore*, 375 U.S. at 342. The union has not been made the *exclusive* agent—indeed it has not been made the agent at all—for employees in the vindication of the constitutional or statutory rights stated in § 1983, Title VII, or the FLSA. Those rights exist independently of the union, are enforceable independently of collective bargaining and of a collective agreement, and cannot be waived or otherwise disposed of by the union.

To give preclusive effect in a § 1983 case to an arbitrator's decision rendered in the context just described would be to deprive the plaintiff in that case of any opportunity to litigate his own statutory claim in his own way. His fate would be controlled by the choices the union had made in determining how to proceed in arbitration—choices that properly took into account the collective interests of the entire bargaining unit. Moreover, if labor arbitrations were given such a preclusive effect, the arbitration process itself would likely be freighted with extraneous conisderations. As a practical matter, the union would be obliged to take into account the fact that an arbitration would cut off an individual's constitutional or statutory rights in drawing the balance between individual and collective interests. The result would be to skew the balance against the collective interests the union has a primary obligation to vindicate.

b. Even when the union concludes that an individual employee's interests are congruent with the bargaining unit's collective interests, it is still true that labor arbitration is not a proper substitute for a judicial pro-

ceeding in determining questions of motive. Such questions are frequently at the heart of § 1983 cases; for example, the ultimate question in the instant § 1983 action is whether the respondent city, in discharging the petitioner, was motivated by the petitioner's exercise of First Amendment rights.

As this Court has recognized, labor arbitration, in order properly to serve its role in the collective bargaining system, must be "an efficient, inexpensive, and expeditious means of dispute resolution." *Alexander*, 415 U.S. at 58. The union's case in a labor arbitration is commonly prepared and presented by non-lawyers; often that is true as well on the employer's side. Indeed, many labor arbitrators are not lawyers. And, there is no meaningful discovery process in labor arbitration—the availability of such a process would transform labor arbitration into precisely the inefficient, expensive, contentious, and drawn out litigation process the parties intended to avoid. Finally, while it is contrary to our experience, a respected and experienced arbitrator has suggested that there are institutional pressures on arbitrators that push against their making a finding that an employer has engaged in conduct that might be violative of constitutional or statutory norms external to the bargaining agreement: "there is some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, may distort adjudication even where there is complete harmony between the individual's interest and those of his representative." Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 44 (1971). That possibility cannot be totally ignored.

Each one of these factors leads to the Court's conclusion in *Alexander* that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the

final resolution of rights created by Title VII." 415 U.S. at 56. See also *Kremer*, 456 U.S. at 478. And the underlying reasoning for that conclusion, set out in *Alexander*, fits § 1983 claims as exactly as Title VII claims:

> . . . [Even] where a collective-bargaining agreement contains provisions facially similar to those of Title VII [,] . . . other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
>
> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. . . . And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." . . . [415 U.S. at 57-58; footnote and citations omitted]

Formal discovery and the other aspects of court litigation are not necessary to the resolution of disputes such as the meaning of a contract clause, whether a promotion was given to the senior employee, or the appropriate level of discipline for misconduct. Such cases are the grist for the labor arbitration mill. But discovery, compulsory process and other procedural devices available in

court litigation are critical in statutory or constitutional cases where the employer's *motive* is the issue.[3]

[3] This Court in *Alexander*, while recognizing that the National Labor Relations Board in some instances "defers" to arbitration awards when a claim of anti-union discrimination underpinning a § 8(a)(3) charge before the Board parallels a contractual claim already adjudicated against the employee in arbitration, 415 U.S. at 56, n.17 (citing *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955)), refused to apply a similar policy of deferral in Title VII actions, 415 U.S. at 56-60. Many of of the reasons given by this Court for rejecting deferral where there is a Title VII or an FLSA claim would seem equally applicable to § 8(a)(3) claims. To the extent *Spielberg* survives *Alexander* and *Barrentine*, that can only be because of a consideration that distinguishes § 8(a)(3) not only from Title VII and the FLSA, but from the Constitution and 42 U.S.C. § 1983 as well.

The Board has predicated its *Spielberg* rule on the view that § 8(a)(3) is one component of an integrated statutory scheme—the National Labor Relations Act, as amended by the Labor-Management Relations Act—which allows employees to opt for organization to advance their collective interests and has as its ultimate objective the achievement of collective agreements that channel disputes through the private dispute resolution mechanisms established in those agreements. The Board draws the conclusion that the totality of that statutory scheme is advanced by declining to adjudicate § 8(a)(3) charges in certain limited circumstances where the agency is satisfied that the contractual issue decided by the arbitrator is identical to the statutory issue posed by the § 8(a)(3) charges and that the collective interests pursued by the union in the arbitration coincide with the interests that § 8(a)(3) is designed to protect. See, e.g., *International Harvester Co.*, 138 NLRB 923, 925-927 (1962), *aff'd sub nom. Ramsey* v. *NLRB*, 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964); *Raytheon Co.*, 140 NLRB 883 (1963); *General American Transportation Co.*, 228 NLRB 808 (1977); *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980); *Propoco, Inc.*, 263 NLRB No. 34, 110 LRRM 1496 (1982).

Whatever the correctness of the Board's approach in § 8(a)(3) cases, that approach can have no application to cases that arise under statutes conferring individual rights that are not subject to disposition by the collective. Cf. *Barrentine*, 450 U.S. at 739. The rights vested in individuals by the Constitution or by other statutes wholly unconnected to the NLRA—such as 42 U.S.C. § 1983—are meant to be enforceable through judicial processes and there is no congressional indication of a preference for resolution of such rights through an arbitral process such as that provided for in collective agreements.

3. The considerations outlined above all lead back to the conclusion this Court has already reached in *Alexander* and *Barrentine*. A preclusion rule would deprive the individual of *his* opportunity to present his federal statutory or constitutional claim to a judge. It would inject extraneous and inappropriate considerations into the arbitration process. See p. 9, *supra*. And, as this Court pointed out in *Alexander*, it "might adversely affect the arbitration system as well as" the judicial system:

> Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less. [415 U.S. at 59].

4. The foregoing does not however mean that there is no place for consideration of a labor arbitration award in the adjudication of a § 1983 claim. The concluding insight of *Alexander*, carried forward in *Barrentine* (450 U.S. at 743-744, n.22), is equally applicable to § 1983 actions:

> The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.[21]

---

[21] We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbtiral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true

> where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Ttile VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum. [415 U.S. at 60 & n.21].

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals in this case should be reversed.

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On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

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BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER, GARY McDONALD

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With the consent of the Petitioner and the Respondents, the Mandel Legal Aid Clinic submits this brief as amicus curiae in support of the Petitioner, Gary McDonald.

STATEMENT OF INTEREST

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, in existence since 1959, is dedicated to protecting against and remedying deprivations of constitutionally protected rights. The Clinic regularly represents persons who bring claims against state and local government employers. Many of these persons have proceeded to grievance arbitration prior to bringing their statutory claims. The application of preclusive effect to arbitration decisions in actions brought under the federal civil rights statutes would substantially restrict the relief available to these clients.

SUMMARY OF ARGUMENT

Arbitration of Petitioner's grievance should not bar his right to bring an action under 42 U.S.C. §1983 arising out of the same facts as his union grievance.

Arbitrations do not have sufficient procedural safeguards to adjudicate §1983 and constitutional rights. Arbitrators do not generally have sufficient expertise to apply federal civil rights statutes or the Constitution. Even if they did, their authority is limited to the contract. This limitation requires that where a statute and a collective bargaining agreement conflict, the arbitrator must apply the contract. If the arbitrator rules that §1983 supercedes the contract, the arbitrator will have exceeded the scope of arbitrable issues, and the award will be unenforce-

able. Moreover, if an arbitrator had the authority to apply §1983, the contract may still limit the availability of relief in the form of damages.

Most significantly, the aggrieved individual does not control the presentation of his grievance at arbitration. Rather, the individual's case is controlled by the union. The individual does not select the attorney who presents the grievance and is not permitted to be represented by his own counsel. Indeed, the individual is not even a party to the arbitration decision, and is therefore not entitled to independent judicial review of the award. Furthermore, because the arbitrator is usually selected by the union and management, the interests of the individual may not be the arbitrator's paramount consideration. Since Petitioner lacked

control over the presentation of his case at arbitration, he was also denied a "full and fair opportunity" to present his claim. The procedural inadequacies of arbitration and the limited subject matter jurisdiction of the forum combine to foreclose giving preclusive effect to arbitration decisions. To give preclusive effect to arbitration decisions in §1983 actions would violate federal law standards of preclusion and due process of law. Likewise general rules of preclusion as set forth in the Restatement (Second) of Judgments (1982) would not accord either issue or claim preclusion to the arbitration in Petitioner's §1983 action.

In effect, the jury trial below was Petitioner's first "full and fair opportunity" to independently present his §1983 claims to a court of competent jurisdiction through

counsel of his own choosing. Therefore, the District Court's judgment should be reinstated, and the Circuit Court reversed.

General rules of preclusion apply to §1983 cases. Allen v. McCurry, 449 U.S. 90 (1980). Where an employee raises a federal statutory claim involving rights conferred upon him as an individual, rather than by a collective bargaining contract, the Court has held that prior arbitration of grievances arising out of the same events will not preclude an individual from independently seeking to vindicate his statutory or constitutional rights before a federal court. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Moreover, the Court has concluded that labor arbitration decisions

are not accorded preclusive effect under 28 U.S.C. §1738, the federal full faith and credit statute. Kremer v. Chemical Construction Co., 456 U.S. 461 (1982).

Rights under §1983 are vested in the individual. Prior to the enactment of this statute, no individual actions were provided to redress deprivations of constitutional rights by state and local authorities. Plaintiffs are granted direct access to federal court to enforce the rights provided by §1983. Indeed, the federal courts have the primary responsibility for enforcing these rights. Under §1983, exhaustion of alternative remedies is not required. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982).

Alexander v. Gardner-Denver's holding that rights under Title VII of the Civil Right Act of 1964, 42

U.S.C. §2000e, et seq. may not be waived by a collective bargaining agreement to arbitrate contract disputes controls here. As with Title VII, §1983 protects individual civil rights. Petitioner may only be deemed to have waived his individual right to resolution of his §1983 claims by jury trial through an independent, voluntary, and knowing waiver agreement with the City of West Branch.

Since a collective bargaining agreement represents the choices of the majority of the members of a bargaining unit, an agreement to arbitrate contract disputes does not prospectively waive an individual's right to bring a §1983 action. Nor does actual submission of Petitioner's claim to arbitration constitute such a waiver, since it would be without consideration. Petitioner always had the right to proceed to arbitration

under the collective bargaining agreement and exercise of this right would be an unwarranted concession for waiving his right to bring a §1983 action.

Affirmance of the Circuit Court decision would not only sacrifice Petitioner's individual rights, but may have the consequence of increasing the federal caseload. Faced with a choice between §1983 rights and contract rights, many will prefer the former and forego use of grievance procedures. Furthermore, since §1983 enforces constitutional rights and the agreement to arbitrate enforces contract rights, there is no inconsistency in allowing deprivations of both these rights to be redressed in their appropriate forums.

ARGUMENT

I. A LABOR ARBITRATION OF A UNION GRIEVANCE SHOULD NOT BAR AN EMPLOYEE'S ACTION UNDER 42 U.S.C. §1983.

A. Labor Arbitration Does Not Provide a Grievant with an Adequate Opportunity to Litigate Statutory or Constitutional Claims.

It is the position of Amicus that this Court should follow its prior decisions and decide not to give preclusive effect to union grievance arbitrations in §1983 actions. Allen v. McCurry, 449 U.S. 90, (1979) held that general principles of preclusion and the standards of the federal full faith and credit statute, 28 U.S.C. §1738, apply to suits brought under 42 U.S.C. §1983. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728 (1981), and Kremer v. Chemical Construction Co., 456 U.S. 461 (1982), this Court indicated that union grievance arbitrations

should not be given preclusive effect in individual claims arising under other federal statutes.

Moreover, Kremer indicated that because the arbital forum is procedurally inferior to state courts and administrative boards, and because arbitrators' expertise is the law of the shop, not the law of the land, arbitration hearings are not subject to the requirements of 28 U.S.C. §1738. 456 U.S. at 477-478. These precedents require that actions under §1983 to redress violations of constitutional rights not be precluded by an arbitration of a grievance arising under a union contract.

This Court was correct in Gardner-Denver, Barrentine, and Kremer to conclude that labor arbitration hearings are procedurally inferior to

those of a judicical forum. They are inadequate for adjudicating statutory or constitutional rights. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. at 742-745.

Labor-management arbitrators are specialists. Their expertise is the "law of the shop," not the "law of the land." Kremer, 456 U.S. at 478; Barrentine, 450 U.S. at 743. Thus, even if permitted to do so, there is no reason to believe that a labor-management arbitrator would competently apply a statute like Title VII, the FLSA, or §1983 to an employee's grievance.[1/] "The

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[1/] Indeed, Chief Justice Burger and Justice Rehnquist, who dissented in Barrentine because they believed wage claims were within the specialized competence of labor arbitrators, indicated that reliance upon arbital decisions to adjudicate civil rights claims could "[undermine] enforcement of fundamental rights Congress intended to protect." 450 U.S. at 750. According to Chief Justice Burger, adjudication of such claims requires reference

arbitrator's future employment depends upon his acceptability to [the union and management] or to groups sharing their interests as distinguished from the individual aggrieved . . . ." Meltzer, Labor Arbitration and Conflicting Remedies for Employment Discrimination, 39 U. Chi. L. Rev. 30, 44 (1971). Moreover, a labor-management arbitrator's authority arises from the contract, not from remedial statutes, and should an arbitrator decide a grievance on the basis of §1983, this Court has recognized that the arbitrator has "exceeded the scope of the submission," and his award will not be enforced. Gardner-Denver, 415 U.S. at 53. Since arbitrators are bound by the

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1/continued: to public law concepts, rather than the "law of the shop." Id. Here, the enforcement of Petitioner's rights would not just be undermined, it would be eliminated altogether since the arbitrator did not consider Petitioner's First Amendment claims.

contract, they cannot provide all the relief to which an individual may be entitled under a parallel statute such as §1983. Barrentine, 450 U.S. at 745.

Perhaps the most significant, and often overlooked inadequacy of labor arbitration is that the aggrieved individual has no control over the presentation of his grievance. The arbitration is between the union and the employer. The union is the party, not the employee. Most collective bargaining agreements provide that the union and management select the arbitrator. The union chooses the lawyer to present the grievance and the employee's attorney is not even allowed to participate in the proceedings. The union decides which witnesses to call to testify. The union decides how to frame the issues and develop the argument. Since

the employee is not a party, he has no rights to judicial review. As Justice Powell stated in Gardner-Denver:

> In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. 415 U.S. at 58, n.19.

To bind the employee by a proceeding in which he could not participate as a party with the full rights usually accorded a party violates due process of law. Lack of control of the presentation of the evidence and the argument deprives the employee of a "full and fair opportunity to litigate" his claim. In Kremer v. Chemical Construction Co., 456 U.S. 461 (1982) the Court relied on the ability of a complainant to present his charge as one indicator that the "full and fair opportunity to litigate" test was met. The Court

indicated that the complainant had "'the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony.'" Id. at 483 quoting State Div. of Human Rights v. New York State Drug Abuse Comm'n, 59 A.D.2d 332, 336, 399 N.Y.S. 2d 541, 544 (1977). The Court also relied on the complainant's rights to rebut evidence submitted by the employer and to have an attorney represent him. Petitioner here lacked control of the presentation of his grievance in the arbitration and was therefore denied his "full and fair opportunity to litigate." See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) and Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 333 (1971).[2/]

[2/] The question of whether the trial judge below exceeded his authority

Such lack of control over the arbitration is especially significant here, because Petitioner asserts that he was discharged on account of the exercise of his First Amendment right to free speech. It is conceivable that Petitioner's interests diverged not only from the City's, but also from those of the very union that represented him at arbitration. This is indicated by the fact that Petitioner sued his union in this action for inadequate representation. Under such circumstances, Petitioner should not be barred by the result of a proceeding in which he did not

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2/ continued: by admitting the arbitration decision into evidence is not before the Court. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n. 21 (1982). Presumably any arbitration proceeding which does not meet the due process requirements of a "full and fair opportunity to litigate" should not even be admitted into evidence, particularly before a jury in a §1983 damage action.

control the presentation of his grievance.

The Restatement (Second) of Judgments would also deny both issue preclusion and claim preclusion for labor arbitrations in this situation. According to the formulation adopted by the Restatement, the arbitration would not be entitled to claim preclusion to bar Petitioner's §1983 action because the arbitrator was not authorized to hear the §1983 claim or provide a damage remedy. Under Section 26 of the Restatement, these limitations on the subject matter jurisdiction of the arbitrator would foreclose giving the award preclusive effect upon Petitioner's §1983 claim. Restatement (Second) of Judgments §26 (1982).

Also, the Restatement (Second) of Judgments would allow Petitioner

to litigate his §1983 claim because the "scheme of remedies" provided by §1983 permits litigation of the §1983 claim. Since §1983 creates an independent action, as argued above, the §1983 claim would not be barred. Restatement (Second) of Judgments §84(2) (1982).

Nor would the Restatement grant issue preclusion to the arbitrator's decision that Petitioner was properly discharged "for cause." Under Section 28 of the Restatement, Petitioner would not be bound on this issue because he could not have obtained review of the arbitration for the correction of errors. Since only the union could seek review of the arbitrator's decision, only the union is bound on the "for cause" issue in further litigation.

The labor grievance arbitration would also not be given preclusive effect on the "for cause" issue because

of the informality and nonjudicial nature of the procedures. Restatement (Second) of Judgments §83(b-e)(1982). Justice Powell described the inadequacies of labor arbitrations in Gardner-Denver:

> [T]he fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. 415 U.S. at 57-58.

The Restatement would also not grant preclusion on the "for cause" issue because the employee is not a party. Since the union is the party, the Restatement would bar the union but not the employee. The Restatement provides that arbitration awards are entitled to the same effect as a judgment of a court except

if the arbitration procedure lacks the elements of adjudicatory procedure required by the Restatement to give preclusive effect to decisions of administrative tribunals. Restatement (Second) of Judgments §84(3)(b)(1982). One of the procedural requirements for administrative tribunals is: "The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties. . ." §83(2)(b). Since the employee does not have these procedural rights on behalf of either himself or the union, the employee is not bound by the arbitration award.

The Comment to §83, which is incorporated into the standards for arbitrations under §84, shows that the employee must have the rights of a party before he can be bound. "In some types

of administrative proceedings, the victim of a statutory wrong may complain to the agency but not be given initiative or control of an enforcement proceeding. In such circumstances the agency rather than the victim is the party to whom the rules of res judicata apply. . . ." Restatement (Second) of Judgments, §83, Comment C (1982). Therefore the union is bound by the arbitration but not the Petitioner who was not a party and did not control the presentation of the evidence and argument in support of the grievance.

B. This Court should adhere to its decisions limiting the preclusive effect of arbitration awards in union grievance proceedings.

The Circuit Court's decision should be reversed because this Court's precedents show that no more weight should be accorded to the arbitrator's decision than that given by the District Court when it admitted it into evidence.

Allen v. McCurry, 449 U.S. 90 (1980) held that general rules of preclusion apply to §1983 cases. In Allen the question presented was whether collateral estoppel would apply to a §1983 case raising Fourth Amendment issues. The Fourth Amendment issues had been previously adjudicated in a motion to suppress evidence at the criminal proceeding in which the Petitioner had been convicted. While not deciding whether the particular facts and circumstances of the criminal proceeding justified giving it any preclusive effect, the Court did conclude that §1983 cases are governed by "traditional" rules of res judicata and collateral estoppel. Id. at 99. The Court remanded the issue to the trial court to determine how the "conventional" doctrine of collateral estoppel applies to the particular facts and circumstances in McCurry's case. Id. at 95, n.7.

The Court further held that the legal standards of 28 U.S.C. §1738, the federal

full faith and credit statute, apply to §1983 actions. Since this court stated in Kremer that arbitration decisions are not included within §1738, this Court should apply its precedents and deny preclusive effect to arbitration decisions in §1983 actions.

Applying the Allen holding to this case, the Sixth Circuit's decision should be reversed and Petitioner's judgment reinstated because this Court's prior decisions show that preclusive effect should not have been given to the labor arbitrator's decision. This Court has consistently refused to grant preclusive effect to an arbitrator's decision where the aggrieved employee subsequently seeks to vindicate an individual right of federal statutory origin which arises independently from the employee's collective rights under the collective bargaining agreement.

Most recently, a labor arbitration of a wage dispute was held not to preclude

an individual employee from bringing an action for violation of the minimum wage provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §201, et seq. Barrentine v. Arkansas-Best Freight System Inc., 450 U.S. 728 (1981). The Court emphasized the individual nature of FLSA rights, in contradistinction to collective contract rights. Id. at 739. It concluded that individual FLSA rights could not be waived by an agreement to submit contract claims to arbitration.

The most analogous decision to this case is Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) in which the Court denied full preclusive effect to a labor arbitration in a subsequent Title VII action. Rather, it ruled that the arbitration may be admitted into evidence and accorded such weight as the trial court deems appropriate. The Court held that the existence of an arbitration clause in a collective bargaining agreement did

not prospectively waive the individual employee's right to bring a later action under Title VII. Rights arising under Title VII were found to be vested in the individual employee and to be independent of those conferred by the collective bargaining agreement.

In Gardner-Denver, Justice Powell, writing for a unanimous Court, upheld the employee's action under Title VII, even though the union contract contained a non-discrimination clause and the issue of discrimination had been presented to the arbitrator. According to the Court's reasoning in Gardner-Denver, Title VII rights do not concern majoritarian processes, that "[o]f necessity, the rights conferred [by Title VII] can form no part of the collective-bargaining process. . ." 415 U.S. at 51.

Submission of a grievance to arbitration was also not deemed sufficient to constitute a waiver of the federal statutory

claims under Title VII arising out of the same facts. Gardner-Denver, 415 U.S. at 52. Justice Powell recognized that labor arbitrations of union grievances are designed to resolve only rights under the collective bargaining agreement and not rights arising under other federal statutes creating distinct rights and remedies for individual employees.

According to Gardner-Denver, waiver of Title VII rights by the union's decision to take a grievance to arbitration would therefore amount to an unwarranted concession by the union of an employee's federal statutory rights in return for obtaining grievance arbitration, a right the employee already had. Id. This Court noted that any effective post-dispute waiver of Title VII rights would have to be voluntary and knowing. "In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement con-

stitute a binding waiver with respect to an employee's rights under Title VII." Id. at 52, n. 15.

The rationale for the no-waiver rules of Gardner-Denver and Barrentine is equally applicable to Petitioner's instant suit under §1983. First, §1983 also created a new cause of action for individuals to obtain redress for deprivations of their constitutional rights. Prior to the enactment of §1983, no individual actions were provided to obtain relief from violations of constitutional rights by state and local authorities. Allen v. McCurry, 449 U.S. at 98-99.

Second, the federal courts are assigned the primary responsibility for enforcing the rights created by §1983. Indeed the role of the federal courts is paramount in resolving §1983 claims. Monroe v. Pape, 365 U.S. 167 (1961); Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982).

Third, §1983 provides even more direct access to federal court than does Title VII. Administrative procedures for the investigation and conciliation of claims are required under Title VII prior to resort to federal court, whereas §1983 does not require any prior administrative procedures. When Congress enacted §1983 it contemplated that individuals denied Constitutional rights were to be accorded a judicial remedy, not a remedy to be rendered by an administrative tribunal or an arbitrator.

Petitioner should not be deemed to have waived his individual rights to bring this action. Just as with Title VII, §1983 vests individuals with a cause of action. Rights under §1983 should not be foreclosed because the employee was a member of a union with an agreement to arbitrate contract claims. Nor should the union's submission of a grievance to arbitration bar the employee. Since

Petitioner never submitted his First Amendment claims to arbitration, his §1983 judgment should be sustained.[3/]

In the case at bar the collective bargaining agreement was between the United Steelworkers and the City of West Branch. As a public sector agreement, it is not subject to the provisions of the Labor Management Relations Act, which endorses non-judicial methods as the preferred form of dispute resolution under collective bargaining agreements. 29 U.S.C. §§152(2), 173(d). Nonetheless, because labor arbitrations in the public and private sectors are identical processes, there

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[3/] Amicus does not mean to argue that claims under §1983 may never be submitted to binding arbitration. An aggrieved individual may, after a dispute has arisen, waive his rights under §1983 by an independent, knowing, and voluntary agreement with his adversary to submit such a claim to an arbitrator. Resolution of a §1983 claim by methods already provided by the union contract should never qualify. Such a waiver would be without consideration since it would be based upon an employee's exercising a right he had all along as a member of the bargaining unit. See Gardner-Denver, 415 U.S. at 52, n. 15.

is no reason for this Court to conclude that public sector grievance arbitration decisions should be granted any greater deference than private sector decisions.

Since public employees are often prohibited from striking, their only recourse may be to arbitration to resolve their grievances. Making these decisions preclude §1983 actions would only exacerbate tensions in public sector employee relations because many grievances would not be brought to arbitration in order to preserve §1983 actions.

This result would also operate to increase the federal court's caseload. Many employees prevail in arbitrations or are satisfied with being heard and do not bring §1983 cases. Forced to make a choice between their §1983 rights and their rights under the union contract, many will choose to pursue their §1983 rights in federal court and forego using the grievance procedures. Thus, in either

the public or private sector, decisions of labor arbitrators should not be given preclusive effect when an employee asserts individual statutory or constitutional rights in a subsequent §1983 civil rights action.

Affirmance of the Circuit Court below would be inconsistent with the reasoning of this court in both Barrentine and Gardner-Denver, in which the Court stated that both collective and individual statutory remedies are equally available to an aggrieved employee, and that "certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." Gardner-Denver, 415 U.S. at 50; Barrentine, 450 U.S. at 745-746.

C. Labor Arbitrations are not accorded preclusive effect under 28 U.S.C. §1738.

This Court should also follow its reasoning in Kremer v. Chemical Construction Co., 456 U.S. 461 (1982) that 28 U.S.C.

§1738 does not require federal courts to give full faith and credit to labor arbitrations of union grievances. This Court explicitly recognized that labor arbitration decisions are not subject to the mandate of 28 U.S.C. §1738. Section 1738 requires that:

> The records and judicial proceedings of any court of any such State. . . shall have the same full faith and credit in every court within the United States. . . as they have by law or usage in the courts of such State. . .

In Kremer, the Court held that a plaintiff seeking relief under Title VII is barred when a state court has issued a final adjudication upon his discrimination charge. Justice White, writing for the majority in Kremer, considered the relationship between labor-management arbitration and §1738 when he distinguished the holding in Kremer from that of Gardner-Denver. Justice White stated:

> The holding in Gardner-Denver was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts.

> Arbitration decisions, of course, are not subject to the mandate of §1738.

Kremer, 456 U.S. at 477.

The rationale underlying this conclusion was made clear by Justice White in the subsequent paragraph of the majority opinion in Kremer:

> The arbitrator's specialized competence is "the law of the shop, not the law of the land," and "the fact finding process in arbitration usually is not equivalent to judicial fact finding." [Gardner-Denver, 415 U.S. at 57] These characteristics cannot be attributed to state administrative boards and state courts.

Id. at 478. Indeed, §1738 does not contemplate according full faith and credit to arbitrators' decisions, but only to "records and judicial proceedings" of the states.[4/]

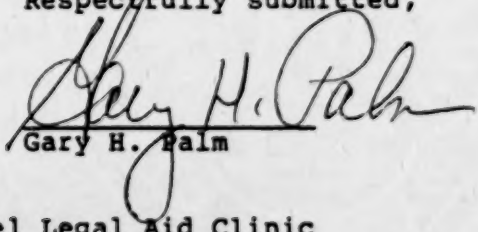
[4/] 42 U.S.C. §1988 also supports reliance on the federal standard set out in Gardner-Denver and Barrentine. Under Section 1988, actions under §1983 are to be adjudicated "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. . . ." 42 U.S.C. §1988.

Petitioner here seeks to vindicate individual rights which arise under the First Amendment and §1983. These rights arise from a legal source independent of his collective rights under the agreement between the United Steel Workers and the City of West Branch. General rules of preclusion, as applied by this court to labor arbitration in the Gardner-Denver, Barrentine, and Kremer cases, require that Petitioner's judgment under §1983 be reinstated.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,



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Petitioner,

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CITY OF WEST BRANCH, MICHIGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-219

GARY MCDONALD

Petitioner,

v.

CITY OF WEST BRANCH, MICHIGAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties [1] in support of the respondents.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and

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[1] Their consents have been filed with the Clerk of the Court.

the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to various civil rights and equal employment laws, regulations, and orders. Many EEAC members are signatories to collective bargaining agreements which contain various types of grievance procedures. As such, EEAC has a direct interest in the issue presented for the Court's consideration in the instant case—whether unappealed arbitration awards should be given preclusive effect in cases brought under 42 U.S.C. § 1983.

Because of its interest in the orderly administration of the nation's civil rights laws as well as the relationship of such laws to collective bargaining obligations, EEAC has filed briefs as amicus curiae with this Court in *W.R. Grace and Company v. Local Union No. 759*, 103 S.Ct. 2177 (1983); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982); and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), among others.

STATEMENT OF THE CASE

Petitioner Gary McDonald was discharged from his position as a West Branch, Michigan, police officer effective on November 25, 1976 (Joint Appendix 24) (hereinafter "J.A."). Among the reasons given McDonald for his discharge was: "[c]onduct unbecoming an officer" (J.A. 24). After his discharge, McDonald filed a grievance pursuant to the collective bargaining agreement then in effect between the City and the Union in which he alleged that his discharge was not for "proper cause," as required by the agreement (J.A. 26).[2] By letter dated December 23, 1976, McDonald was notified of the specific incidents of misconduct which led to his discharge, including "[m]aking a sexual assault upon a minor female (J.A. 27).

After the preliminary steps in the grievance process had been exhausted, the grievance was taken to arbitration at the request of McDonald and the City. The arbitration hearing was held on June 9, 1977 before George E. Bowles, an arbitrator for the American Arbitration Association. The issue submitted to the arbitrator was: "Was the discharge of Officer Gary McDonald for just cause?" (J.A. 32, 44). At the arbitration hearing, McDonald was represented by counsel, who had issued subpoenas and who conducted extensive direct and cross-examination of the witnesses. Although the collective bargaining agreement prohibited discrimination "because of their membership in, or their activity in behalf of, the Union" (J.A. 46), McDonald never contended during the ar-

[2] Article III of the collective bargaining agreement provides in relevant part that the City could "discharge employees for proper cause" (J.A. 47).

bitration hearing that he was discharged for his union activities. Post-hearing briefs were filed with the Arbitrator by counsel for McDonald and the City.

In an opinion dated October 31, 1977 (J.A. 30-43), Arbitrator Bowles upheld the discharge. The arbitrator found that the discharge was for "proper cause" based on the "Dack" incident in that McDonald had made "a sexual assault on a minor female" (J.A. 32-38, 42-43.) The arbitrator found:

> [That] Officer McDonald, because of the Dack incident, has lost his effectiveness as a police officer in the community. The misconduct is of such a nature and so seriously destructive of the sensitive police role that it is found that no remedial action of the Arbitrator can be expected to restore Officer McDonald to a position of confidence and acceptance in the community in a police role (J.A. 43).

McDonald did not appeal or otherwise seek to have the arbitration award overturned.

On November 21, 1979, McDonald filed the instant action pursuant to 42 U.S.C. § 1983 (J.A. 3).[3] In particular, he alleged that his discharge was because of his union activities, which he maintained were protected by the First Amendment's right to freedom of

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[3] 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

association (J.A. 5). In its answer, the City alleged as affirmative defenses that McDonald had waived his civil action by resort to arbitration and that the suit was barred because his claim had been adjudicated in the arbitration proceeding (J.A. 22).

A jury trial was held on March 9-14, 1981, before the Honorable James Harvey, United States District Judge for the Eastern District of Michigan, Northern Division (J.A. 1-2). At the conclusion of the plaintiff's case, the defendants moved for a directed verdict based on the preclusive effect of the prior arbitration decision. The district court denied the motion. (Appendix to the Petition for Writ of Certiorari at A8-A11) (hereinafter "Pet. App."). The jury found, on special interrogatories, that Chief of Police Longstreet had discharged the plaintiff because of his union activities,[4] and awarded McDonald four thousand ($4,000.00) dollars in compensatory and four thousand ($4,000.00) dollars in punitive damages (J.A. 2). The jury found in favor of all other defendants (J.A. 2). Defendant Longstreet's motion for judgment notwithstanding the verdict was denied on May 28, 1981 (Pet. App. A12-A13).

In an opinion filed on April 16, 1983, the Court of Appeals for the Sixth Circuit reversed the judgment

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[4] The special interrogatory on which the jury found for McDonald read in its entirety as follows:

Plaintiff's First Amendment Claim

1. **Do you find that defendant Paul Longstreet discharged the plaintiff from his position as a police officer in retaliation for, or to suppress, his union activity, and therefore in violation of his First Amendment rights to freedom of speech or association?**

yes ☒ no ☐

(Pet. App. A15).

of the district court (Pet. App. A1-A5). In doing so, the court of appeals stated that:

> It is clear from the arbitrator's award that he found that the *reason* for the plaintiff's dismissal was the Dack incident. Plaintiff's first amendment argument seeks to relitigate this issue and hence to vacate the arbitrator's award. The parties have agreed to settle this dispute through the private means of arbitration. Since we find no abuse of that process, we conclude that its result should not be disturbed (Pet. App. A3) (emphasis added).

SUMMARY OF ARGUMENT

The court of appeals properly refused to allow relitigation of the petitioner's discharge claim. Nothing in Section 1983 prevents a court from affording preclusive effect to a claim which actually was decided in an arbitration proceeding, or which could have been determined in such proceeding had it been raised. Likewise, nothing in Section 1983 prevents a court from denying a party the opportunity to relitigate issues that actually were decided in an arbitration proceeding. In this instance, the petitioner had a full and fair opportunity to have his grievance heard and the reasons for his termination decided. Accordingly, petitioner's subsequent lawsuit under Section 1983 properly was barred based on recognized principles of res judicata and collateral estoppel. Sound policy reasons exist for refusing to allow the subsequent relitigation of a claim previously submitted to binding arbitration.

Section 1983 neither repealed nor restricted the traditional doctrines of res judicata and collateral estoppel. *Allen v. McCurry*, 449 U.S. 90 (1980).

Thus, the same principles of res judicata and collateral estoppel should be applied to an arbitration award as would be applied to a state court judgment. Restatement (Second) of Judgments § 84 (1982). Since the petitioner could have raised in the arbitration proceeding his claim that his termination was because of his union activities, he is precluded from relitigating that issue in the guise of a constitutional claim. Likewise, under established principles of collateral estoppel, the petitioner should be estopped from relitigating the issue of whether his discharge was for proper cause.

Neither this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), nor in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), justifies denying preclusive effect to the final arbitration award herein. Those decisions deal with specific statutory schemes that vest individual employees with "nonwaivable public law right[s] . . . that [are] separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining," *Barrentine*, 450 U.S. at 737-38, and with respect to which the interests of the majority, as perceived by their union, might well be at odds with those of the individual. *Gardner-Denver*, 415 U.S. at 58, n.19; *Barrentine*, 450 U.S. at 742. In contrast, the plaintiff here bases his Section 1983 claim on an asserted violation of his right to engage in union activities—a right that is inextricably bound with the collective bargaining process and with respect to which the union's interests are presumptively in harmony with the plaintiff's. Accordingly, there is no need to extend the principles of *Gardner-Denver* and *Barrentine* to this situation in order to assure adequate protection of the plaintiff's

individual rights. Indeed, to deny preclusive effect to an arbitral finding of just cause for discharge in these circumstances would diminish the role of binding arbitration so that practically any discharged public sector employee who lost in arbitration could relitigate his discharge under Section 1983. There is nothing in the legislative history of Section 1983 that supports such an expansive reading of that statute.

The strong federal policy favoring the promotion of stability in employment relations supports according finality to arbitration awards. Courts have deferred to collectively-bargained resolution processes where the dispute arises out of the collective bargaining agreement. The reasons favoring according finality to arbitration awards include the efficient use of judicial resources, the limiting of costly and time consuming litigation, and the preservation of the integrity of the arbitration process. In instances such as this, where the grievant has had a full and fair opportunity to present his claim in the arbitration hearing, a policy of granting a preclusive effect to an arbitration award helps to preserve scarce judicial resources without sacrificing the rights of individuals.

ARGUMENT

I. A PRIOR ARBITRATION AWARD RENDERED AFTER A FULL AND FAIR HEARING PRECLUDES RELITIGATION UNDER SECTION 1983 OF CLAIMS OR ISSUES ARISING OUT OF THE SAME TRANSACTION

In *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980), this Court rejected the argument that Section 1983 repealed or restricted the traditional doctrine of preclusion. In so doing, the Court rejected the notion "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* at 103. Although *Allen* involved a state court decision, there is no persuasive reason why a similar preclusive effect should not be given to an arbitration award, particularly where the petitioner was afforded a full and fair opportunity to present his claim in the arbitration hearing.

This Court repeatedly has recognized the importance and continuing vitality of the related doctrines of res judicata and collateral estoppel. In *Allen*, *supra*, 449 U.S. at 94, this Court stated that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *See also Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, n.6 (1982); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). Likewise, this Court has stated that "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."

Allen, supra, 449 U.S. at 94. *See also Kremer, supra*, 456 U.S. at 466, n.6; *Montana v. United States*, 440 U.S. 147, 153 (1979); *Cromwell v. County of Sac supra*, 94 U.S. at 352.[5] Thus, "res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *Allen, supra*, 449 U.S. at 94.[6]

The Restatement (Second) of Judgments § 84 (1982) provides that a "valid and final award by arbitration has the same effects under the rules of res judicata . . . as a judgment of a court."[7] Thus, the

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[5] The Restatement of Judgments now uses "claim preclusion" and "issue preclusion" in place of res judicata and collateral estoppel, respectively. Restatement (Second) of Judgments § 31 (1982).

[6] One general exception to the principles of res judicata and collateral estoppel is that the party against whom an earlier decision is asserted must have had a "full and fair opportunity" to litigate the issue in the earlier proceeding. *See Kremer, supra*, 456 U.S. at 481, n.22; *Montana, supra* at 153; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971). As set forth below, petitioner in this case had a "full and fair opportunity" to raise both the claim of whether his discharge was for his union activities and whether there was proper cause for his discharge.

[7] Section 84 of the Restatement (Second) of Judgments provides in its entirety as follows:

> (1) Except as stated in Subsections (2), (3), and (4), a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.
>
> (2) An award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim

same principles of res judicata and collateral estoppel should be applied herein as would be applied to a state court judgment, absent special circumstances that would make such an application inappropriate.[8]

The court of appeals herein concluded that, based on the arbitrator's award, "the district court should have applied res judicata and collateral estoppel principles to dismiss the section 1983 action" (Pet. App. A3). As set forth below, whether this case is viewed as controlled by principles of claim preclusion or issue preclusion, the court of appeals was correct in refusing to allow relitigation of petitioner's previously determined discharge claim.

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based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.

(3) A determination of an issue in arbitration does not preclude relitigation of that issue if:

(a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or

(b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83(2).

(4) If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

[8] As set forth below, none of the exceptions in § 84 apply to this case.

The essence of petitioner's grievance was that he was discharged without proper cause, as required by the collective bargaining agreement.[9] Since the collective bargaining agreement prohibits discrimination "because of their membership in, or their activity in behalf of, the Union" (J.A. 46), it is clear that the petitioner could have raised in the arbitration proceeding the issue of whether his termination was because of his union activities. It also is clear from prior decisions of this Court that "[a] party cannot escape the requirements of . . . res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters Assur. Co. v. North Carolina Life*, 455 U.S. 691, 710 (1982); *Kremer, supra*, 456 U.S. at 465, n.4; *Sherrer v. Sherrer*, 334 U.S. 343, 352 (1948). Since the petitioner could have alleged a claim in the arbitration proceeding based on the nondiscrimination clause in the collective bargaining agreement, he should be precluded from raising that issue subsequently in the guise of a constitutional claim.

This Court has recognized that "[r]es judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes." *Kremer, supra*, 456 U.S. at 481, n.22, *citing Nash County Bd. of Ed. v. Biltmore Co.*, 640 F.2d 484, 488 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). Thus, petitioner properly may be precluded from relitigating the instant claim. In any event, it

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[9] Petitioner's grievance stated:

> We state that the Discharge has no proper cause, and further feel that there is no legitimate reason for this type of action, or any other type of action against officer Gary McDonald (J.A. 26).

is clear that the petitioner is estopped from relitigating the *issue* of whether there was proper cause for his discharge.

In the instant case, the issue that was presented for the arbitrator's decision was: "Was the discharge of Officer Gary McDonald for just cause?" (J.A. 32, 44). The arbitrator found, based on the "Dack" incident of sexual assault on a minor, that there was just cause for the petitioner's discharge (J.A. 32-38, 42-43). In its opinion reversing the district court decision in this case, the court of appeals stated that "*the reason* for the plaintiff's dismissal was the Dack incident" (Pet. App. A3). Likewise, in his concurring opinion, Judge Merritt stated that "[i]t is clear from the arbitrator's award that he found that the reason for the plaintiff's dismissal was the Dack incident involving sexual misconduct and not any speech or union activities by the plaintiff" (Pet. App. A5). Thus, it is clear that both the arbitrator and the court of appeals viewed the issue that was determined in the arbitration hearing to be whether there was just (or proper) cause for the plaintiff's discharge. Since that issue was in fact determined in the arbitration, the court of appeals was correct in estopping the petitioner from relitigating the reasons for his discharge. Since the applicable collective bargaining agreement provides that "[t]he decision of the arbitrator shall be final and binding on the parties" (J.A. 49), the petitioner should not be allowed to relitigate the reasons for his discharge, especially where there are no overriding policy reasons supporting such relitigation and where the previous proceeding complied with the basic requirements of due process and fairness.

The petitioner relies on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), in support of its contention that an adverse arbitration award should not be given preclusive effect in a subsequent suit based on Section 1983. Neither *Gardner-Denver* nor *Barrentine*, however, mandates a denial of preclusive effect to an arbitration award in subsequent Section 1983 actions. Both of those cases were concerned with statutes that contained extensive administrative and judicial schemes in particular and discrete areas—employment discrimination under Title VII in *Gardner-Denver* and overtime claims under the Fair Labor Standards Act (FLSA) in *Barrentine*.

A major concern of the Court in *Gardner-Denver* was that a "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made." 415 U.S. at 58, n.19. In fact, the long history of union discrimination led Congress to forbid discrimination by unions as well as employers. *See* 42 U.S.C. § 2000e-2(c). Similar concern about the potential divergence of interest between the union and the individual was expressed in *Barrentine*, where the Court noted that "a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." 450 U.S. at 742. There is no reason to believe in this case, however, that the interest of the union was in any way inimical to that of the petitioner. On the contrary, the petitioner's Section 1983 claim herein was

based on an asserted violation of his right to engage in union activity—a right that is part and parcel of the "majoritarian processes" of collective bargaining, 450 U.S. at 737-38, and which the union can be presumed steadfastly to support.[11] For this Court to extend the rule of *Gardner-Denver* and *Barrentine* so as to deny preclusive effect to a binding arbitration award in these circumstances would transform virtually every discharge of a public sector employee into a potential Section 1983 action.[12]

The petitioner contends that a denial of preclusive effect to an arbitration award is supported by the legislative history of Section 1983. This argument is

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[11] An additional concern underlying this Court's decisions in *Gardner-Denver* and *Barrentine* was that issues of racial discrimination under Title VII and wage entitlements under the FLSA might lie beyond the "specialized competence of arbitrators," some of whom are not lawyers. 450 U.S. at 743 and n.21; 415 U.S. at 57, n.18. The question presented by the petitioner's Section 1983 claim in this case, however—whether the discharge was for just cause or for union activity—was the type of issue which an experienced labor arbitrator can be presumed to be at least as well qualified as a court, and probably far better qualified than most juries, to decide.

[12] Even if petitioner had not raised his claim based on his union activities, it is likely that he would have pursued his Section 1983 claim based on an alleged violation of his due process rights in the grievance process. Unless preclusive effect is given to final arbitration awards, every such discharge of a public employee presents the opportunity for a claim under Section 1983 based on some alleged constitutional violation. Of course, as noted above, where a grievant is able to set forth substantial evidence that he was not afforded a full and fair opportunity to have his claim heard in the earlier proceeding, a court may elect not to apply the principles of res judicata and collateral estoppel.

advanced despite petitioner's admission that "the legislative history does not directly deal with arbitration" (Petitioner's Brief at 21) (hereinafter "Pet. Br."). As is clear from the legislative history cited by the petitioner (Pet. Br. 18-21), the primary concern of Congress was ensuring a full and fair opportunity to present claims to an impartial decision-maker. Where a full and fair opportunity to present a claim has been afforded a person, such as in the instant arbitration, there is nothing in the legislative history of Section 1983 which would prevent giving such an award a preclusive effect in a subsequent civil action.

Petitioner also contends that he was not given a full and fair opportunity to present his claim (Pet. Br. 37). As this Court has noted, however, no single model of procedural fairness is dictated by the Due Process Clause of the Constitution. *Kremer, supra,* 456 U.S. at 483; *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610 (1974); *Inland Empire District Council v. Mills*, 325 U.S. 697, 710 (1945). In the instant case, the petitioner was represented by counsel who had issued subpoenas and who conducted extensive direct and cross-examination.[13] Petitioner's counsel filed a post-hearing brief and the arbitrator issued an opinion which set forth in detail the reasons for his decision. Under these circumstances, it is clear that the petitioner was afforded a full and fair opportunity to contest the reasons for his discharge. The fact that the petitioner never raised a claim based on his union activities during the entire course of the grievance process indicates that this claim may have

[13] In fact, the arbitrator's opinion makes reference to the "vigorous cross-examination by Union counsel" (J.A. 35).

been merely an afterthought used as a means of converting a simple discharge into a constitutional claim under Section 1983.[14] Under these circumstances, there is no persuasive reason for not giving preclusive effect to the arbitration award herein.[15]

II. PERSUASIVE POLICY REASONS SUPPORT GIVING PRECLUSIVE EFFECT TO FINAL ARBITRATION AWARDS

This Court clearly has articulated the effect to be accorded an arbitral decision which adjudicates claims under a collective bargaining agreement. Under the

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[14] The petitioner also maintains that union control of the arbitration process poses risks to the rights of Section 1983 claimants (Pet. Br. 26-29). In the instant case, however, it is clear that there would have been no conflict between the petitioner and the union on the union activity issue, since, as noted above, the prevention of discrimination on the basis of union activity clearly is of vital interest to the union. Moreover, in a broader sense, on the rare occasions when the union fails to protect its members' interests, a cause of action for breach of the union's duty of fair representation would ensure that employee's rights are protected. *See Vaca v. Sipes*, 386 U.S. 171 (1967). The petitioner's complaint alleged that the union breached its duty under state law to represent him adequately. The district court declined to exercise pendent jurisdiction over this claim and petitioner neither sought review of that determination nor pursued the claim in state court.

[15] The petitioner has cited the decision of another panel of the Sixth circuit in *Becton v. Detroit Terminal of Consol. Freightways*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1432 (1983), in support of his argument that an arbitration award does not preclude a subsequent action under Section 1983 (Pet. Br. 14-15). As the petitioner acknowledges (Pet. Br. 14), the language in *Becton* regarding Section 1983 was dictum and is not instructive in light of the subsequent holding of the Sixth Circuit in the instant case.

Steelworkers trilogy,[16] an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both.

The policy according finality to arbitration is designed to promote stability in industiral relations through the collective bargaining agreement. *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 578. It has been recognized that arbitration can be a stabilizing influence only insofar as it serves as a vehicle for handling any and all disputes that arise under the agreement. *United Steelworkers v. American Mfg. Co., supra*, 363 U.S. at 567. As this Court explained:

> [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

United Steelworkers v. Enterprise Wheel & Car Corp., supra, 363 U.S. at 596 (footnote omitted).

There is a strong Congressional policy favoring the use of grievance procedures and arbitration as a means of resolving labor disputes. Thus, Congress has stated in this regard that:

> [f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over

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[16] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> the application or interpretation of an existing collective-bargaining agreement. 29 U.S.C. § 173 (d).

See also 29 U.S.C. §§ 108, 171(b). *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 578, and n.4; *United Steelworkers v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 596; *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 458-59 (1957). Accordingly, courts have deferred to collectively—bargained disputed resolution processes where the dispute arises out of the collective bargaining agreement. *See, e.g., Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 562-63 (1976); *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368, 377-80 (1974); *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652-53 (1965). This policy favoring resolution of labor disputes through grievance or arbitration processes has become increasingly important in the public sector as well. In fact, "arbitration has come to be the favored procedure for resolving grievances in federal *and Michigan labor relations.*" *City of Grand Rapids v. Grand Rapids Lodge,* 415 Mich. 628, 330 N.W.2d 52, 54 (1982) (emphasis added).

The reasons that favor according preclusive effect to arbitration awards are substantial and include the efficient use of scarce judicial resources, the limitation of costly and time consuming litigation, the preservation of the integrity of arbitration awards and the avoidance of inconvenience and harassment of the litigants. In addiiton, the issue presented in the arbitration hearing in this case—whether there was proper cause for petitioner's discharge—is one that is peculiarly within the scope of the collective bargaining agreement and the expertise of the arbitrator.

Arbitration provides an extrajudicial means by which disputes that typically arise in an employment setting, such as whether there existed proper cause for the discharge of the petitioner, can be resolved in a more efficient and less expensive manner without further burdening our overcrowded court system. Given the increasing number of civil cases that are filed in federal district courts, it is essential that alternative methods of resolving disputes short of litigation be explored and encouraged. The crucial need for the expansion of such extrajudicial methods of dispute resolution is reflected in the dramatic increases in the numbers of civil cases and appeals that have flooded the federal courts.[17] Thus, it is clear that some means must be discovered to decrease the proliferation of civil litigation. It is submitted that providing preclusive effect to final arbitration awards would be an appropriate step toward resolving the current crisis in the federal court system. In cases such as this, where a grievant has been afforded a full and fair opportunity to present his claim in an arbitration proceeding, granting a preclusive effect to such an award will foster the preservation of scarce judicial

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[17] For example, civil filings in all federal district courts in 1960 were 59,284; in 1981, there were 180,576 filings, an increase of 204.6%. Annual Report of the Director, Administrative Office of U.S. Courts 363 (1981). During the same period, the number of appeals docketed in the courts of appeals increased from 3,899 to 26,362, an increase of 576%. *Id.* at 346. The cases on this Court's docket in the 1980 term had grown to 5,144. *Id.* at 345. Justice O'Connor has noted that 20% of the cases decided by the Court in the 1981 term were Section 1983 cases. Address to Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983.

resources without sacrificing the rights of individuals which Section 1983 is designed to protect.[18]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 21, 1983

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[18] Petitioner maintains that giving preclusive effect in Section 1983 actions to final arbitration awards would amount to an abrogation of the individual rights guaranteed by Section 1983 (Pet. Br. 16-18). Granting preclusive effect to a binding arbitration award, however, would not entail a waiver of an employee's Section 1983 rights, but merely would affect the forum in which those rights may be pursued. In instances where the grievant has been afforded a full and fair opportunity to present his claim, the fact that the claim is presented in an arbitration hearing should not affect the application of traditional res judicata or collateral estoppel principles.

No. 83-219-CFX
Status: GRANTED

Title: Gary McDonald, Petitioner
v.
City of West Branch, Michigan, et al.

Docketed:
August 11, 1983

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Achtenberg,David Jacks

Counsel for respondent: Smith,Richard G.

Entry	Date	Note	Proceedings and Orders
1	Aug 11 1983	G	Petition for writ of certiorari filed.
2	Sep 6 1983		Brief of respondents City of West Branch, et al. in opposition filed.
3	Sep 7 1983		DISTRIBUTED. September 26, 1983
4	Oct 3 1983		Petition GRANTED.
			**********
5	Nov 14 1983		Joint appendix filed.
7	Nov 15 1983		Order extending time to file brief of petitioner on the merits until November 21, 1983.
8	Nov 21 1983		Brief of petitioner Gary McDonald filed.
9	Nov 21 1983		Brief amicus curiae of AFL-CIO, et al filed.
10	Nov 23 1983		Brief amicus curiae of E. F. Mandel Legal Aid Clinic filed.
11	Nov 23 1983		Record filed.
12	Dec 21 1983		Brief of respondents City of West Branch, et al. filed.
13	Dec 21 1983		Brief amicus curiae of Equal Employment Advisory Council filed.
14	Jan 9 1984		SET FOR ARGUMENT. Monday, February 27, 1984. (3rd case)
15	Jan 11 1984		CIRCULATED.
16	Feb 14 1984	X	Reply brief of petitioner Gary McDonald filed.
17	Feb 27 1984		ARGUED.